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California Code of Regulations, title 2,
section 7288.0
Harassment Training Regulations

Initial Statement of Reasons

Exhibit A

Section 7288.0 Harassment Training Regulations
Initial Statement of Reasons, Exhibit A

Document **Tab**

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Potential Issues for Harassment Training Regulations

1. Do the 50 employees need to reside in California?

2. Should out-of-state supervisors be covered by section 12950.1 if they supervise California employees?

3. Should FEHA's definition of a supervisor, at Government Code section 12926, subdivision (r), define "supervisor" for 12950.1 training purposes?

4. Does section 12950.1 training need to be given all at once? If not, what should be the minimum duration of harassment training?

5. What constitutes "interactive" training?

6. What constitutes sufficient "knowledge and expertise" in a 12950.1 trainer?

7. Is a certification process desirable for trainers? If so, what procedure would you recommend to certify trainers?

8. How best to cover effectively the mandatory content?

9. Should the mandated training include other types of harassment (racial, religious, sexual orientation, etc.) to be included in the training in addition to sexual harassment?

10. Suggestions for language for a "sunset provision" for the 12950.1 training employers have already provided their supervisors without benefit of FEHC regulations?

11. Should there be any enforcement mechanism set forth in the regulations? If so, how best should the statute be enforced?

July 20, 2005 Fair Employment & Housing Commission Advisory Committee on Mandatory Harassment Training – Minutes

FEHC AC members present: Commissioner Linda Ng, FEHC Acting Executive and Legal Affairs Secretary Ann Noel, Commission ALJs Jo Anne Frankfurt and Caroline Hunt, Stephen Anderson, Ely Gardner, Julie Hall, Michael Korcuska, Garry Mathiason, Paul Ramsey, and Victor Salazar

FEHC AC members participating by telephone: Simao Avila, Lester Jones, and Bruce Monfross

FEHC AC members unable to attend: FEHC Chairman George Woolverton, Paul Schechter, and Pat Shiu

After introductory remarks, where those present went around the room, introduced themselves, and identified their top issues, the group discussed the following issues.

<u>HOW TO CHARACTERIZE IN THE REGULATIONS WHAT IS "INTERACTIVE"?</u>

Ann Noel (AN): How do we insure that the trainings are interactive? It's possible with e-learning to build in interactivity with required questions and answers, but what about with a seminar on the web, also-called a "webinar?"

Michael Korcuska (MK): Goal with an "interactive" requirement is to assure that the trainee is "paying attention." There are mechanisms with computer e-learning programs that require intervention from the user before continuing

The problem is assuring that the learner "understands" the training's information. Computer programs can assess understanding by asking a question and requiring an answer

Garry Mathiason (GM): Harassers can score perfectly on the test. The program must have questions and answers with very quick feedback on what is wrong and why. "Try again" probably is not enough for effective learning.

Stephen Anderson (SA): "Webinar" is probably the least desirable method of learning. Is it interactive according to us?

MK: Agrees that a webinar is the worst method of interaction. Technology is the cheapest and easiest, but it is unreliable to gauge learning. Best method is classroom instruction in person, second best is e-learning which is individual.

Victor Salazar (VS): Are we applying a higher standard to the e-training than we are to the classroom? The classroom setting can be very passive too.

Lester Jones (LJ): If we look at the statutory language, it says "classroom or other effective training," the statute assumes that classroom training *is* effective. How to do "individualized web-based training"?

Ely Gardner (EG): Bank of America added California law to its individualized web-based training. This is actually easier to do with web-based e-learning than any other method. You just customize training required for different states.

MK: Would like to say every 2 years is 2005, 2007, 2009. But if trained in Jan., then have to be Jan. 2007? And new people coming in, when must they be trained?

GM: Web-based: learning material must be able to be in sub-groups able to be bookmarked so person can pause program and pick it up where they left off. In the classroom, that instructor has a panoply of skills and methods to keep attendees interested.

SA: E-learning, can have multiple scenarios to click through. How does one measure 2 hours? Is it what is provided, or the capacity of the individual to move through the material?

MK: If classroom teaching is the optimum teaching mode, the content for a web-based training or a webinar is what one could cover in two hours if one was in front of an instructor. Take that quantity of material and put it into the "two hours" of web-based content.

MK: 1 test at end is not sufficient to meet interactive requirements. Need to have requirement that no longer than 15 minutes without feedback/interaction. One concern: accessibility to the visually challenged. Programs are set up to read text, and one can change the tuning speed to read the words at up to 4 times the average reading speed. So, how to measure when "2 hours" is completed? Should one define average reading speed for an individual and base the amount of content on the running time required to read the program?

Bruce Monfross (BM): The State Personnel Board has a 3 ½ hours, 2 instructor sexual harassment training course which is not limited to supervisors. Up to 100 people might attend, but generally approximately 30 attend. In total, California state supervisors are required to take an 80 hour course.

Julie Hall (JH): Mode of the program needs to be tailored to the size and nature of the company. For example, at Lockheed Martin, a defense contractor, employees are used to taking e-learning courses in modules. They do training all the time on ethics, security, etc. which the federal government requires, and at regular intervals. When an employee logs onto his/her computer and enters his/her employee number, the computer tells individual when he/she is due to take next training

Sim Avila (SMA): UC has sexual harassment training for all employees. By necessity, have to go to web-based program to get everyone trained. Faculty is used to interactivity, asking questions. With web-based programs, however, one loses the individualized aspect that one has with a classroom setting and the ability to ask questions.

GM: Can have a web-based program with the ability to email questions to the trainer or HR, but caveat, with too many questions, can overload the system.

JH: Suggests having program say, if any questions, contact your HR department, and then give phone numbers and/or email addresses of HR personnel.

MK: Can have hyperlink to general HR number, and then customize to the actual phone numbers

Commissioner Linda Ng (LN): How often should one update the training programs? Training must be up to date, tracking the law. Commissioner Ng mentioned, for example, new California Supreme Court decision, Miller v. Ca. Dept. of Corrections.

SA: Suggests that the refresher course should be new content, a refresher of skills building from the first training, a little higher level of training to prevent sexual harassment and resolve sexual harassment complaints.

WHAT SHOULD BE INCLUDED IN THE REQUIRED SEXUAL HARASSMENT TRAINING CONTENT?

GM: If employer wants to go broader to include all forms of harassment, employer should not be penalized by Commission on grounds that 2 hours of training was not limited to only sexual harassment. The author of AB 1825, former Assembly Member Sarah Reyes, worked with the Hispanic and African American caucuses to get this bill passed. There's a reason why the later half of the bill references "harassment" rather than "sexual harassment." Intent of legislature was to allow employers to cover other forms of harassment in the two hour training. Please don't have regulations that specify an employer can only include sexual harassment. Need regs that say other forms of harassment can be covered, rather than specifying that other forms of harassment should be covered or other forms of harassment cannot be covered in those 2 hours.

JH: No, statute says sexual harassment, it's in the title. What was intended by legislature was to require 2 hours of sexual harassment training, can do other training as well, just as long as at least 2 hours is devoted to sexual harassment.

Paul Ramsey (PR): statute requires that instruction include "practical examples" of sexual harassment, taught by someone with "knowledge and expertise," establishes a "minimum threshold"

LJ: Training should incorporate the broad panoply of protected bases: race, national origin, sexual orientation, religion, etc.

PR: 2 hours is a problem to get all bases covered. But thinks title of statute is irrelevant.

GM: Need emphasis on practical examples and remedies. What employer should be doing internally? California and federal law are not so different in terms of covering the law regarding sexual harassment, definitions, liability, etc. Maine and Connecticut have similar laws requiring

mandatory training, but it's had a tiny effect nationwide because they are small states. But California will be making law for the entire 50 states; whatever we do, rest of country is likely to follow, especially if sexual harassment complaints decline after every California employer has provided training.

MK: Don't want to make it impractical for an employer to do national training. So want to create courses that can be used nationwide.

JH: Does it need to be any more specific than the statute?

AN: More interested in skill building to train supervisors how to identify harassment, how to conduct an effective investigation, how to prevent harassment from occurring.

Ely Gardner (EG): Need to identify goals that employer needs to accomplish in training such as training must teach supervisor how to recognize sexual harassment, and how to respond to complaint of harassment, how to take sufficient remedial action, how to do an effective investigation.

MK: No one's going to get good at investigation in 2 hours but loves the idea of wording in the regs that requires teaching supervisors to know how to respond to a sexual harassment complaint.

GM: Discussed how to "identify" sexual harassment. Let employers have their own methodologies. There are two different worlds: investigators or front line managers.

SA: Management has responsibility to recognize and identify sexual harassment, communicate employer's policies re sexual harassment, address complaints about sexual harassment.

GM: This would work. Both worlds (investigators and front line managers) could use these tools.

WHO IS A QUALIFIED TRAINER?

SA: Referred group to notes he developed on this subject in handout. Does not think a law degree is any guarantee of quality training. Need to look at a variety of factors: knowledge of subject matter, experience as a trainer

MK: With e-learning, there is no "trainer". So is it a standard for the developer of the e-learning course? Should there be a higher standard for e-learning developers?

JH: Suggests that HR personnel could do training, if they have dealt with sexual harassment cases before and understand the law. Factors to be considered: work experience training employees on employment law, investigating sexual harassment complaints, dealt with sexual harassment complaints on the shop floor. List factors that may be considered, but are not limited to.

EG: need to put in regulations that 2 hour sexual harassment training of employees (who may or may not be supervisors) does not mean concession by the employer that these individuals are supervisors for any other purpose. Otherwise, discourages employers from offering sexual harassment training to a broader range of employees.

GM: Philosophy of maximizing the training is met by above EG point

[Commission Note: Submitted by Stephen Anderson, 7/20/05]

Hello BRAC Members,

The following information addresses issues # 5, 6 and 8 in Ann Noel's July 8, 2005 letter Re: Issues to be discussed. This information is based on what I've learned over the past twenty-five years of designing and delivering mandatory sexual harassment training to about ten thousand supervisors, customizing train-the-trainer programs and certifying over thirty people, (who were/are lawyers, managers/directors of HR/EEO/Diversity departments, mediators, trainers, psychologists, and professors) to deliver my customized sexual harassment/respectful workplaces programs, as senior associates of Anderson-davis, Inc.

I. Supervisors Frequently Asked Questions

- When is the line crossed from a compliment to a sexually harassing comment?
- What is the difference between flirting, joking around, asking for a date, and sexual harassment?
- How can you know if your behavior is unwelcome if nobody tells you?
- Why do I have to contact HR if my employee asks me to, "do nothing" about their complaint?
- Does our policy apply outside of our workplace?
- How do I protect myself from false charges?
- What are the definitions and differences between sexual harassment and sex discrimination?
- What is our (employer's) policy (*note*: when asked less than 25% have read the policy) and complaint process?
- What do I say to my employee if she/he asks me to "do nothing" or "keep confidential" our conversation about her/him receiving unwelcome behavior?
- What is the legal basis of sexual harassment?
- How do I deal with employees who are doing prohibited behavior, but no one has complained?

II. Effective 'interactive' and mandatory sexual harassment supervisory training should primarily focus on providing practical information and resolution skills to answer and address management personnel's FAQ.

These are the 'key concept/core knowledge' areas that should be included in that training:

1. Communicate and clarify employer's sexual harassment policy and complaint process:
    a. Where does it apply?

b. Is an employee required to tell his/her harasser to stop *before* talking with her/his supervisor or employer?
c. What does 'need to know' mean?
d. What happens if I'm accused?
e. What is my role and responsibility during my employer's fact-finding process?
f. When and how do I document?
g. When and how do I contact HR/EEO/ETC. department?
h. How is retaliation prevented?
i. What is the process if the complainant says, "do nothing"?
j. When is it ok for the complainant to "deal with it her/him self?"
k. What do I do if I hear a rumor that someone is being sexually harassed?

2. Objective methods for recognizing subtle sexual harassment, sex discrimination, and behavior prohibited by their employer's sexual harassment policy, when no one has said, 'stop'.

3. Definitions of terminology.

4. Opportunities to use the above information to individually evaluate visual situations/scenarios and determine if that behavior is prohibited by their employer's sexual harassment policy.

5. Increased sensitivity about why it is difficult to talk about, and sexual harassment's impact on everyone in the workplace.

6. Overview of the legal basis of federal and state prohibitions of sexual harassment and discrimination.

7. How to avoid mistakes when receiving complaints.

8. Learn how to respond appropriately to an employee's complaint.

9. Learn when and practice how to intervene and stop behavior prohibited by the employer's policy, when there is no complaint.

These are two main reasons to use the above training approach:

A. Less than 5% of the supervisor's questions and concerns are about their personal liability, federal and state legal basis/prohibitions of sexual harassment, and sexual harassment court cases.

B. Most employers' sexual harassment policy makes their management personnel responsible for 'monitoring' their workplace, and for 'preventing' sexual/protected characteristics harassment.

Training methodologies would include:

1. Mini lectures on 'key concepts/core knowledge', policy, legal basis and terminology
2. Video or trainer dramatizations of situations that show various behaviors prohibited by employer's policy;
3. Individual decision making activities that has each participant apply 'key concepts/core knowledge' to scenarios;
4. Small and large group discussions
5. Skill building activities that focus on how to receive a complaint and intervene
6. Course test

Note: This is the content that should be included in the AB 1825 compliant 'interactive' two-hour supervisory training and the DFEH information sheet (from 12950. and 12950.1): (Note: This content is included in the above training program's 'key concepts/core knowledge'.)

- The illegality of sexual harassment.
- The definition of sexual harassment.
- A description of sexual harassment, utilizing examples.
- The internal complaint process of the employer available to the employee.
- The legal remedies and complaint process available through the department and commission.
- Directions on how to contact the department and the commission.
- Federal and State statutory provisions – prohibition, prevention and correction of sexual harassment
- Remedies for victims – employer's, federal and state
- Practical examples of harassment, discrimination and retaliation
- Instructions for supervisors on prevention

III. Employer's Eight-Step Process for developing and delivering effective employer-wide training.

Step One – Employer Writes a Sexual Harassment Policy and Complaint Process
Note: A 'best practices' sexual harassment policy would also incorporate and support the employer's initiatives/goals/values of creating and maintaining a sexual harassment-free and respectful workplace. Senior management will review and endorse the policy.
Step Two – Train all Personnel Responsible for Receiving and Resolving Sexual/Protected Harassment Situations/Complaints
Step Three – Design Two Hour Sexual Harassment Training Program and support video/print/power point materials
Step Four – Trainers Deliver Pilot Program(s) and Executive Briefing
Step Five – Deliver Supervisor's Training
Step Six – Deliver Non Supervisor's Training
Step Seven – Provide One-on-One Training for Harassers and Heal Workplaces Impacted by Harassment Situations

Step Eight – Review past training and use that feedback to design follow-up training

IV. Trainer Qualifications

A. An effective sexual harassment training program will be 'content' NOT 'trainer' focused and dependant, because:

1. Most trainers are very anxious about not knowing how to appropriately respond to participants' questions.
2. This assists medium and larger employers in providing consistent training from program-to-program and trainer-to-trainer within its workplaces.
3. The 'key concepts/core knowledge' will assist trainers in answering 99% of all questions. The other 1% the trainer researches and gets back to the participant.

B. Trainers should NOT have a reputation of being a hugger, sexual, flirtatious, aggressive, arrogant, abusive, demeaning to women/men, telling jokes or using gender/ethnic/etc. stereotypes or derogatory language or have had a complaint (where merit was found) filed against him/her and should NOT wear inappropriate clothing at work and or during the training.

C. Trainers SHOULD use gender-neutral language/pronouns when talking about the accused, complainant, job titles/positions and dramatizing sexual harassment situations.

D. An effective sexual harassment trainer is a person who is comfortable with using various training methodologies, facilitate small and large group discussions, has a reasonable understanding of the federal and state laws/regulations, is an effective listener, has a positive professional reputation, credible, and continues to learn about gender and cultural issues and concerns.

This document is not intended to be all-inclusive about any of the topics it discusses.

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[Commission Note: Text of 7/29/05 email sent to all FEHC Advisory Committee members. Attached to original email was FEHC Minutes (see Tab 3) and Stephen Anderson submission (see Tab 4)

Dear Advisory Committee members:

Thank you for attending our July 20, 2005, Advisory Committee meeting and giving Commission staff such good advice. Your thoughtful comments will greatly improve the draft regulations that staff submit to the Commission.

As promised, here is a summary of the comments from the July 20, 2005 meeting. It is not a perfect reflection of all of your comments at the meeting; rather we tried to write down the gist of what was said.

At the July 20 meeting, we agreed that Advisory Committee members would send suggested language for the sexual harassment training regulations to me and then I would distribute it to others on the Committee. (Alternately, please copy the above email list and send your comments directly to all Committee members.) I would appreciate if you could send me any suggested language by Friday, August 12. That will give staff two weeks to incorporate your ideas into the draft that we send the Commission by the end of August.

For those of you who were unable to attend the meeting, we would welcome your comments and thoughts now.

In addition to the meeting summary, I have included suggestions from Stephen Anderson that he distributed at the meeting. Also included below is a suggested change from Julie Hill, a suggestion for a "sunset" provision distributed at the meeting, and earlier suggestions by Garry Mathiason.

Julie Hall's suggested language:

> Pursuant to Title 2 CCR Section 7285.7 (b), I hereby offer, as an employment attorney, licensed to practice in California, and speaking for myself, and not my employer, Lockheed Martin, the following recommended language for the regulations (promulgated as guidelines for interpretation of and compliance with Government Code Section 12950.1)
>
> "The Employer is encouraged, and may in its discretion, provide education and training regarding unlawful harassment, discrimination, and retaliation to a broader group of employees than is required, pursuant to Government Code Section 12950.1. For example, the Employer may decide that it is a prudent employment practice to provide training to employees who do not meet the definition of "Supervisor", as defined in Government Code Section 12926, subsection (r) . Thus, while the Employer is not lawfully compelled to educate or train certain employees outside the definition of "Supervisor", the Employer should not be automatically penalized for doing so. Thus, in providing the two-hours of education and training to its employees, as described herein, the Employer is not deemed to have conceded that any individual trained is a "Supervisor", as defined in Government Code Section 12926, subsection (r)."

Proposed "sunset" language distributed at July 20 meeting:

> The final adoption of FEHC regulations regarding California Government Code section 12950.1 is expected to be completed in early 2006. A covered employer who has made a substantial good faith effort prior to December 31, 2005 to comply with section 12950.1 shall be deemed to be in

compliance with section 12950.1. However, once the regulations are adopted, prospective compliance with the regulations is required.

Thoughts on "sunset" provisions and on including other bases in harassment training from Garry Mathiason:

Ann, I attended a meeting yesterday reviewing compliance efforts of employers throughout California under AB 1825. Clearly these employers (many of them large companies) have had to proceed with their training based on the best legal advice we can offer to be in compliance with the statute. This is also undoubtedly true for many other employers advised by other counsel. After attending that meeting, the number one event that will cause panic will be draft regulations that suggest something different than what responsible employers are doing now to meet the deadline. No matter how hard we and other firms try to assure employers that the FEHC will carefully consider later input and that the final regulations may be very different, this will not stop the panic or massive confusion regarding whether tens of millions of dollars worth of completed training should be redone. At a minimum plaintiff counsel would argue that the training was invalid because it did not exactly comply with the draft regulations.

Based on the above concern and consistent with your internal and external requirements, is it possible to have input from the public and a studying of the topic before the first draft regulations are issued? I am convinced that some of the major landmines would be immediately apparent and easily corrected such that the impact of the draft regulations would be much more positive. THIS WOULD BY FAR BE THE BEST SOLUTION. No matter how hard staff tries to be careful and constructive, the potential for such an inadvertent landmine is high.

Alternatively to the above solution, some relief would come from draft regulations explaining that in 2003, 2004 and 2005 reasonable compliance efforts by employers would be accepted, even if they differed from the draft regulations. Once the enacted regulations are then put in place, employers would for future training be required to comply. This would not stop the full panic, but it would certainly help.

To make my point specifically, please consider the following example. For a decade we at Littler have worked with our clients stressing that it is NOT ENOUGH to do just sexual harassment training. (Indeed, the June 2005 California Lawyer is publishing a letter from me with this same theme.) We have INSISTED that our clients include race, creed, color, national origin, age, etc. into their training programs explaining that all of these protected categories can lead to unlawful harassment. We have cited the definition of "harassment" in Section 7287.6 from your regulations and explained that it applies to all the protected categories. Such training has of course showcased sexual harassment and provided examples, but it has also put significant emphasis on race. After 9/11 national origin and religion have received more emphasis although these were always part of the training. THESE ARE STATE OF THE ART EXCELLENT PROGRAMS APPROVED BY COURTS, JAMS, THE EEOC, AND MANY STATE AGENCIES. If the "draft" regulations innocently explain that two hours of pure sexual harassment training is required, we will have nuclear meltdown.

While AB 1825 (GC Section 12950.1) is focused on sexual harassment prevention, it clearly allows and anticipates examples of other prohibited harassment. Government Code Section 12950.1 (a) [last sentence] provides "The training and education shall also include practical examples aimed at instructing supervisiors in the prevention of harassment, discrimination, and retailiation, and shall be presented by trainers or educators with knowledge and expertise in the prevention of harassment, discrimination, and retaliation [emphasis added]." The modifier "sexual" is intentionally not used as a signal that sexual harassment will many times take place in the context of other unlawful conduct which is also prohibited. Finally, Section 12950.1(f) encourages more "elaborate" training on workplace harassment etc.

We have been advising clients that training of 2.5 hours or more that is primarily on sexual harassment but integrates other workplace harassment and unlawful discrimination is ESSENTIAL AND SUPERIOR to two hours of pure sexual harassment. This is exactly how the law is written in Government Code Section 12940(a) and in the Code of Regulations Section 7287.6---discrimination and harassment are applied to a number of prohibited categories.

Ann, I am confident that when the Commission finishes its work and has public input from constitutents (labor, management, experts, minority groups, etc.), it would make thoughtful and reasoned decisions. However, with a December 31, 2005 deadline the "draft" regulations will take on incredible importance, far greater than you have likely experienced in the past or would intend. With just the one illustrative example presented above in this e-mail, I can see the compliance effort getting pushed back ten years when no one consciously intended or expected such a result.

I do not know whether the Commission has discretion on this issue, but issuing the draft after some public input would greatly reduce the potential for such catastrophic unintended consequences given the unique timing of this situation. Indeed, taking public comment on June 7, 2005 regarding the issue of when and how to issue draft regulations might also be an option.

Please regard the above comments as public input from a very concerned citizen who is motivated by having dedicated my career to improving conditions in the workplace and advising employers on the need to follow the law (indeed, today diversity, inclusion, and mutual respect in the workplace are as essential to business success as they are to legal complinace). Hopefully, this information is helpful and appropriate. Thank you for taking the time to review it.

Garry

Additional Comment (the following is parapharased from recently published material on AB 1825):

Anything that inadvertently suggested the need to separate sexual harassment training from other training on workplace harassment would be a gigantic step backward. AB 1825 offers the potential to motivate immediate compliance efforts that fully cover sexual harassment, discrimination and retaliation while also covering other workplace harassment, discrimination and retaliation. From a time efficiency and understandability perspective there are many common elements between different type of prohibited harassment, such as reporting, compliant procedures, investigation, corrective action, assurance of non-retaliation, and remedies. Even the definition of harassment has common elements between prohibited categories. For example controlling workplace graffiti and recognizing that it may contribute toward a hostile work environment would apply to offensive sexual content in the same way it would apply to offensive racial content. The critical teaching points include identifying graffiti as a source of potential workplace harassment, alerting supervisor's to their responsiblities to control graffiti, and informing supervisors of the need to take action even if they have not yet received an employee complaint. To teach this lesson once for sexual content and a second time for race, and then several more times for other offensive content is inefficient and divides the world into neat categories when in fact conduct often involves more than one prohibited category of conduct.

If a 2.5 hour or 3.0 training program on unlawful harassment covers the essential information on sexual harassment comparable to a 2.0 course on sexual harassment, it seems that such a solution should be encouraged, and at a minimum not discouraged. Again, our concern is an inadvertent discouragement from the draft regulations before public comment and review. While AB 1825 is a simple and short collection of words, I have been truly surprised at the variety of interpretations, unanswered questions, and misunderstandings that have resulted. Even with the greatest degree of expertise and good intentions, it is almost certain that unintended consequences

will come from the first draft of the regulations. The more that the staff and Commission become aware of how training is being planned and implemented in the workplace, the less likely it is that such unintended consequences will occur. On the other hand, I envision significant benefits coming from the regulations as they facilitate high quality training that can actually improve conditions in the workplace and facilitate many of the goals and objectives of the FEHC in enforcing California's laws.

Ann Noel

[Commission Note: Submitted by Garry Mathiason, Littler Mendelson, 8/15/05]

Proposed FEHC Regulations for California Government Code § 12950.1

INTERIM COMPLIANCE PROVISION

I. ISSUE

California Government Code Section 12950.1 mandates sexual harassment training for supervisory employees by January 1, 2006. However, the implementing regulations from the Fair Employment and Housing Commission defining the specific requirements for training to be in compliance with Section 12950.1 will not be finalized until early 2006. Should the FEHC provide guidance to employers on what constitutes compliance prior the issuance of the regulations? If so what language is suggested?

DISCUSSION

California Government Code Section 12950.1 requires that employers with 50 or more employees provide its supervisory employees with two (2) hours of mandatory harassment training by January 1, 2006. However, the statutory language does not provide detailed guidance regarding requirements for the content or delivery of the training. Further, the implementing regulations from the Fair Employment and Housing Commission (which are expected to develop and articulate the specific requirements of the mandatory training) are not scheduled to be final until early 2006. Therefore, in the meantime, employers are left guessing as to what is specifically required to comply with the new law. Guidance regarding the adequacy of interim compliance efforts would be of great value to all the stakeholders.

In order to value the efforts of employers who make a substantial good faith effort to come into compliance with California Government Code Section 12950.1 by the January 1, 2006, deadline, a pre-regulations compliance provision should be included in the implementing regulations promulgated by the FEHC. This will greatly assist employers in encouraging them to meet the statute's deadline and to not be penalized for in good faith guessing wrong regarding what needs to be included in the training.

The implementing regulations should be prospective from the date of adoption. Non-compliant training programs created before the promulgation of the implementing regulations should NOT automatically be deemed non-compliant or be judged solely by the requirements under the new regulations. It will take a reasonable period to review the regulations and determine what if any fixes are needed. This should be no less than three months and no more than six. DURING THAT TIME (CERTAINLY FOR 90 DAYS) SUBSTANTIAL GOOD FAITH TRAINING SHOULD BE ALLOWED TO COUNT TOWARD STATUTORY COMPLIANCE.

Turning to the practical impact of the regulation, consideration needs to be given to how

the regulation will be used by the plaintiffs and defendants in litigation. AB 1825 is largely enforced indirectly through harassment cases that are brought under California law. Plaintiff's counsel will argue that the employer should have done training under Section 12950.1 and to the letter of the regulations. Defense counsel will argue that the employer did its best to reasonably comply with AB 1825 before the regulations were issued. The "sunset" provision (or interim compliance provision) would set some guidelines and expectations for what is expected to be argued in court. Plaintiff can argue non-compliance, claiming that the training does not match the new regulations, and was not substantial or conducted in good faith. Reasonable employer could argue that their compliance efforts were done in good faith and substantial. The employer would then argue that such efforts would meet the FEHC's interim compliance provision for the period prior to the issuance of regulations and during the period needed for their implementation by the employer. A 90 day to 6 month transition period allows a smooth exchange of content without an abrupt halt to training that needs to be modified. Most likely for employers who are doing good faith substantial training the modification will be minor. The easiest way to hand the transition period is to separate the final adoption date from the effective date of the regulations. If the regulations are adopted by the Commission on Feb. 1, 2006 (for example), their effective date for enforcement could be July 1, 2006 or August 1, 2006. This is the same concept used by the Legislature unless a statute is adopted as an emergency.

Clearly the FEHC has authority to issue such an Interim Compliance Provision because it needs to determine the type of training that it will deem sufficiently compliant so as to qualify for meeting the two year requirement. An employer with substantial good faith efforts would receive credit for 2005. Any new training for the same supervisors would then not be required until 2007. Obviously the future training would need to be fully compliance with the regulations. Accordingly, the FEHC is not retroactively regulating, but instead qualifying the type of 2005 training it will recognize in determining future training requirements.

Consistent with the above rationale for the FEHC Interim Compliance Provision, we strongly oppose any need for supervisors to be retained because of technical non-compliance in 2005. If the FEHC adopted the words "substantial good faith training," little would be gained from retaining especially with the mandate that retaining will be required for all supervisors in two years. The cost of retraining would be huge and the added benefit in preventing harassment would be minimal.

Note I: Even minor changes in training due to the regulations will require significant resources and efforts by employers and providers to ensure compliance. For some this can be accomplished in 90 days, but for many forcing compliance in this timeframe would demand significant resources and be very difficult to fully implement. A much more reasonable period is six months. Moreover, the quality of the implementation could be significantly improved by allowing enough time to properly redo vignettes, train trainers, and ensure that all of the training being done by larger employers is meeting the same standard of compliance.

Note II: Since the above material has been prepared, it has come to our attention that the adoption process may itself provide some of the review time employers will need to comply with the Regulations. The critical time is the period between the final approval by the FEHC and the effective date of the Regulations. Meanwhile, the more the Regulations first proposed by the Staff look like the Regulations adopted by the FEHC, the less "panic" and confusion will take

plan. Accordingly, the current process of trying to anticipate the implementation challenges now and address them is advantageous to all the stakeholders.

II. PROPOSED LANGUAGE

"A covered employer that made a substantial good faith effort to comply with Section 12950.1 prior to the effective date of the regulations, shall be deemed to be in compliance with Section 12950.1 regarding training done during this pre-regulation period and the employer shall receive credit for this training as though it had been done under the regulations. The effective date of the regulations shall be not earlier than six months after their final adoption. "

SUPERVISOR DEFINITION PROVISION

I. ISSUE

California Government Code Section 12950.1 mandates harassment training for supervisory employees by January 1, 2006. However, the statue does not define who qualifies as a supervisory employee. Therefore, should the Fair Employment and Housing Commission determine how to define supervisory employee in its implementing Regulations? What impact should such a determination of supervisory status have in other forums and for other purposes?

II. DISCUSSION

California Government Code Section 12950.1 requires that employers with 50 or more employees provide its supervisory employees with two (2) hours of mandatory harassment training focusing on sexual harassment by January 1, 2006. However, the statutory language does not articulate what qualifications define a supervisory employee. Therefore, it is the responsibility of the Fair Employment and Housing Commission to clearly define supervisory employee for purposes of Section 12950.1.

In order to avoid confusion, the Commission should adopt a definition of supervisory employee for purposes of Section 12950.1 that allows interested parties such as employers, the Department of Fair Employment and Housing, as well as the courts to identify with reasonable certainty the covered supervisors. More specifically, the Commission should adopt a definition of supervisory employees that is well established and that has existing and accepted interpretations from the aforementioned entities.

The definition of supervisor at California Government Code Section 12926 (r) is an appropriate definition of supervisory employee for purposes of California Government Code Section 12950.1. The definition states,

> "Supervisor" means any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to direct them, or to adjust grievances, or effectively to recommend that action, if, in connection with the

> foregoing, the exercise of that authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Cal. Gov't Code § 12926 (r). This definition has a long history of interpretation and is well understood among employers, the Department, and the courts. It is also similar to the definition under Section 2(11) of the National Labor Relations Act (a federal law provision that has thousands of interpretive decisions).

In order to honor the intent behind California Government Code Section 12950.1, promote training throughout all levels of organizations, and not unnecessarily harm employers who chose to implement training programs beyond the minimum requirements of the statute and regulations, an employee's attendance at the mandatory training for supervisory employees should NOT be deemed to be an admission of that employee's supervisory status for any other purposes. This would be analogous to cases where simply holding a supervisory title does not equate to supervisory status for other purposes. For Example, according to *Lamb v. Household Credit Services* , 956 F. Supp. 1511, 1516-17 (N.D. Cal. 1997), a co-worker who lacks authority to counsel, investigate, suspend or fire, or to change the conditions of employment, is not a supervisor under Title VII, even if he or she has a title of "manager" or "supervisor."

III. PROPOSED LANGUAGE

"Supervisory employees" are supervisors as defined under California Government Code Section 12926, subdivision (r). Cal. Gov't Code § 12926 (r) provides:

> "Supervisor" means any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to direct them, or to adjust grievances, or effectively to recommend that action, if, in connection with the foregoing, the exercise of that authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

An employee's participation in harassment training required by California Government Code Section 12950.1 shall not be deemed to be an admission of that employee's supervisory status for any other purpose. [Optional: Likewise an employee's exclusion from such training shall not be deemed to be an admission of that employee's non-supervisory status for any other purpose.]

INTERACTIVE PROVISION

I. ISSUE

California Government Code Section 12950.1 mandates classroom or other effective interactive training and education regarding sexual harassment for supervisory employees by January 1, 2006. However, the statute does not define what qualifies as other effective interactive training. Therefore, should the Fair Employment and Housing Commission clarify in

its implementing Regulations what constitutes other effective interactive training and education?

II. DISCUSSION

California Government Code Section 12950.1 requires that employers with 50 or more employees provide two (2) hours of classroom or other effective interactive training and education focusing on sexual harassment to its supervisory employees by January 1, 2006. However, the statutory language does not define any specific requirements for what qualifies as other "effective interactive training and education." Therefore, the Fair Employment and Housing Commission can greatly assist the implementation of the statute by defining "other effective interactive training and education" for purposes of Section 12950.1.

What is clear from the statute is the emphasis on the "interactive" feature of the training. Certain types of traditional training are clearly not "interactive" and do not qualify under the statute. Workbooks, video training materials, and DVD programs by themselves are not "interactive" and do not qualify. However, any or all of the about educational techniques might qualify if integrated into a training program that is sufficiently "interactive."

There are currently three (3) primary methods of providing interactive training to employees. These include: traditional classroom training, on-line interactive training, and webinar type training. It is clear on the face of the statute that classroom training is per se an acceptable means of educating supervisory employees for purposes of Section 12950.1. Also clearly envisioned by the statute is "interactive" on-line training and education. While the nature of the interactivity can benefit from some clarification, the term "interactive" is currently associated with the on-line educational movement. The Honorable Sarah Reyes, author of California Assembly Bill 1825 (codified as California Government Code Section 12950.1), has publicly stated that an intent of the statute was to take advantages of the great progress made over the last several years in the use of technology for training. She has explained that as long as the training allows for interactivity between the learner and the program and prevents skipping ahead or jumping section, it is the type of training methodology that the Legislature intended.

A third method of "interactive" training is web-based instruction with a live presenter. This is not "classroom" training, but it can be "other effective interactive training and education." The key is making it "interactive" such that the learner is **required** to take some action or give input during the program. This can be accomplished by periodic questions that the learner addresses on-line. Like on-line programs, this ensures that the learner is present and following the material. Merely providing the learner the option of asking questions are the end of the program or during the program does not assure that it is "interactive." If the program can run for two hours with no evidence that the learner is present or paying attention, it seems that the "effective" interactive component is missing. Accordingly, web-based instruction with a live presenter should be one way to meet the requirements of the statute provided the learner has been required to "interact" with the program at least every ten to fifteen minutes.

The next stage of analysis needed is to examine what actions or activities are necessary to meet the standard of "effective interactive training and education." In today's technologically empowered world, "interactive" has a well accepted definition. The American Heritage Dictionary of the English Language, 4th Edition, 2004, provides three definitions: "1. Acting or

capable of acting on each other. 2. Computer Science: Of or relating to a program that responds to user activity. 3. Of, relating to, or being a form of television entertainment in which the signal activates electronic apparatus in the viewer's home or the viewer uses the apparatus to affect events on the screen, or both." Even more directly relevant, the Computer Desktop Encyclopedia defines "interactive" as "The back-and-forth dialog between the user and the computer." (Computer Language Company, Inc. 1981-2005.) The term "interactive" appears on the web in approximately 206 million publications. Overwhelmingly the term is used to identify sources that are computer enabled to teach information to human users based on the reactions, learning speed, and responses of the user. Examples of such sources range from The Wall Street Journal Interactive Edition to Roget's Interactive Thesaurus. Using "interactive training and education" in its contemporary setting, most commonly contemplates teaching involving the exchange between a computer and a student. To better ensure that this training is "effective" it seems that a minimum amount of interactivity should actually take place. This can be accomplished in many ways including the requirement that the user identify himself or herself when entering the course, move from module to module by clicking forward arrow buttons, and answer periodic questions as a requirement for advancing through the course. Some interaction should be required periodically to ensure that the learner is remaining involved. In many ways computer-based systems can be more effective than classrooms in requiring this type of interactivity. On the computer the learner can be required to answer a substantive question every five or ten minutes, while a similar inquiry of "each" student in a classroom would be very difficult.

Answering Questions. Government Code Section 12950.1 does not mandate that either classroom instruction or interactive computer-based training provide the ability to answer questions from the learners. Nonetheless, on-line and/or webinar learners, like classroom learners, should have access to some resource that can answer questions that arise during training. The most effective and cost efficient means for employers to provide this resource for on-line and webinar type training is though an integrated resource guide. The resource guide would provide extensive information regarding the most frequently asked questions and would deliver instant feedback to learners. In fact, the resource guide will often be more effective than a live instructor at providing responses to inquiries because it will be comprehensive, indexed, and easily searched. Further, the resource guide is not limited by the individual knowledge of any one instructor. Additionally, most on-line programs allow for the inclusion of the employer's "Prohibited Harassment Policy" as an additional resource for answering questions.

The above information should meet any reasonable standard for providing information and answering questions. If the Commission decides that more is required of employers, the most cost effective solution would be to provide learners with the telephone number and e-mail address of a human resource professional (or other knowledgeable person) who can answer questions. As a convenience (not a requirement) an e-mail link could be built into most on-line courses to facilitate such communication. The employer would respond to phone calls and e-mail inquires in a reasonable timeframe, but setting exact response times would be impractical and unwise. Each situation will be different depending on the question, its complexity, available resources, and individual schedules. Moreover, such a procedure should not be a substitute for a complaint procedure which should separately exist. Over the years the courts (federal and state) have examined the timeliness of responses to employee complaints. Even in such circumstances where the urgency is far greater than in the training context, the timeliness of the response has

been determined on a case by case basis.

In comparing live instruction with computer-based instruction, it is extremely misleading to draw comparisons regarding how questions would be treated and answered. First, most effective computer-based training programs will contain far greater information than can reasonably be expected of even the most qualified instructors. This means that for the majority of questions, the computer-based system will probably provide be the superior resource. Second, not all questions asked of a live instructor will result in an immediate response. When information is lacking, a responsible instructor will research the matter and get back to the student. Third, students may feel embarrassed or otherwise reluctant to ask certain questions in a classroom setting, whereas it may be much easier to ask such questions through a computerize learning system. Fourth, it is inefficient and prohibitively expensive for an employer to have a live person available to answer computer-based questions in real time. Few questions would be asked and the complexity of arrange for a knowledgeable person to be available at the exact time each computerized course is taken would be as expensive as live instruction (thus nullifying a major component of Section 12950.1 and greatly increasing costs to employers). Moreover, the benefit to the learners from such availability would be next to meaningless, compared with the costs and complexity required. Accordingly, answering computer-user questions should be handled in the manner suggested above and not treated the same as questions asked during a live classroom session.

Learner Testing. While periodic testing of a learner as he or she progresses through an on-line program can be an excellent way of reasonably assuring attention (and learning), it is strongly recommended that testing be optional under the Regulations. First, there are no established standards for a passing score nor is there any research to show that good test results with reduced unlawful harassment. Second, Section 12950.1 does not require testing of classroom participants or any participants. Third, testing is only valuable as a teaching tool. This means that students should receive detailed feedback regarding their answers so they can correct wrong answers and confirm that right answers are correct for the right reasons. Fourth, testing data could be seriously misused in the litigation process. Fifth, mandatory testing would be another increased cost of complying with Section 12950.1 that would need to be quantified. Accordingly, it is recommended that testing not be a requirement, but that testing could be shown as one way to show interactivity regarding on on-line program provided that the testing occurred throughout the program, was necessary for the learner to proceed, and enabled the learner to immediately be told whether the answer was correct or incorrect, and why.

III. PROPOSED LANGUAGE

"Other effective interactive training and education" includes computer-based training programs, certain web-based training, and non-classroom live instruction. Such training may be synchronous or asynchronous. [Alternative replacement sentence: Such computerized training may be conducted on-line in real time, delayed, or on demand.] Employers using such non-classroom training shall reasonably ensure that participants are engaged in the training for its

duration and affirmatively interact with the program, web-presentation, or trainer(s) at least once during each fifteen minutes of instruction. Computer tacking records of individual participant participation may be used to show compliance with these requirements. Workbooks, videos, or non-interactive DVD's by themselves will not meet the Statute's requirements. Such training tools may be integrated into classroom or computer-based training provided they do not substantially limit the interactive nature of the overall training experience.

[Optional Additional Language—not recommended: Classroom and non-classroom interactive training and education should allow participants to ask questions regarding or relating to the course subject matter. Responses may be provided during the training, following the training, or in computerized resource materials provided as part of the training. *Further optional not recommended language:* The listing of phone number(s), e-mail, or other contact information of one or more knowledgeable employer representatives may be used to comply with this Section. Questions should receive responses within a reasonable time period, normally not to exceed one-week.

MINIMUM TRAINING TIME

I. ISSUE

California's new Government Code section 12950.1 requires employers having 50 or more employees to "provide *at least two hours* of classroom or other effective interactive training and education regarding sexual harassment to all supervisory employees." Cal. Gov. Code § 12950.1. (*emphasis added*). Should the training be continuous? How is the "two hours" measured for computer based training?

II. DISCUSSION

There is nothing in the statute stating that the two hour requirement will only be met by a single, continuous two hour training session. The Regulations should make clear that in order to meet this two hour requirement, an employer has the choice whether to conduct a single two hour session, a pair of one hour sessions, four half-hour sessions, or some other reasonable combination that adds up to two hours. The ultimate decision of whether or not to conduct the training in segments should be the employer's to make. This decision may depend on the type of training the employer opts to use. For example, it would seem uneconomical to do less than two hours of live instruction. Meanwhile, computer-based learning could be highly effective even if it is bookmarked and returned to several times.

The ultimate decision of whether the training will take place one time in a two hour session or over a course of smaller sessions amounting to two hours will be based on the individual employer's circumstances, and therefore must rest with the employer. For this reason, the regulations accompanying Section 12950.1 **should not require** that the training be given all at once. While nothing in the regulations should prevent continuous training (two hours or more at one time), the regulations should not *require* such continuous training.

A more difficult question is how to measure the minimum two hour requirement. In answering this question, it should be stressed that nothing could undermine the intent and effectiveness of Section 12950.1 more than a tax accountant's approach to measuring the two hours. While two hours is a specific period of time, the message from the Legislature was to place a certain importance on harassment prevention and dedicate at least the amount of training and emphasis associated with a two hour program to this purpose. It is possible to design a program that is so bad that little would be learned in eight hours. It is also possible to have an epiphany in only a few minutes and dramatically change behavior. No one wants an auditor standing in the back of a classroom with a stop watch adding or subtracting minutes depending on how the time is used. The best test for meeting the two hour requirement is to measure the actual two hours it would take for a standard live instruction training course and equate it to the quantity of material covered. With this equation established some simple rules suggest themselves.

For live instruction, the measurement and standard is two hours. Most two hour programs are short enough that a special break would not be taken. It is assumed that the material covered during the program is largely presented verbally. Thus the number of words covered is based on speaking time, not reading time. Participants sign in at the beginning of the course and sign out at the end, or merely sign once signifying that they have participated in the entire two hour program.

Turning to web-based training or computer based-training, the same standard applies. Almost all of the programs are voice-enabled, and they can be matched up with the equivalent of a two-hour live classroom instruction. Based on the use of sound (voice), the program will have an average run time. This will be a two hours (minimum) for the average user and will have few variations. Since a compliance program does not allow skipping sections, the average time to finish the program is remarkably stationary. A person having trouble with the program may take longer (even significantly longer) than the average person because they are getting more questions wrong and having to redo questions for a second and even a third time. **Regarding the average sound enable time for a computer-based program, it will be necessary for the producer of the program to set the average run time. This will be done based on how long it takes an average person to finish the program without a break. ACTUAL RUN TIMES MAY NOT BE THE BEST MEASUREMENT BECAUSE THE VIEWER COULD HAVE STOPPED AND STARTED THE PROGRAM**.

Using the course producer to certify the sound enable run time is practical and **VERIFIABLE.** Plaintiff's counsel or educational experts could replay the course and quickly determine whether the average run time was two hours (or very close to it). The listing of the sound-enabled run time would be much like labeling a motion picture's run time (recognizing it could be stopped and started). The one significant difference is that the interactivity will cause different people to have different run times (but all within a reasonable range). Another difference is that some sound-enable courses also have reading. Nonetheless, with experience the course producer should be able to established the expected run time of the program.

Once the sound-enabled run time is established, it does not seem difficult to conclude that this should be the standard for the course. It matches up with what can be accomplished in a classroom during the same time period. If anything, the efficiency and scripting of the

computer-based program will result in more content being covered in two hours than can normally be covered in a live course. Once the standard is set then it can be used to measure time for a participant who "reads" the course rather than takes it in its sound-enabled form. For those with disabilities it might be necessary to take it in a read-only form. For others the technology they use only allows for read only. An excellent reader with very good comprehension might be able to cover the "read-only" version of the course in one and a half hours. Meanwhile, a poor reader (perhaps with a learning disability), might take four hours. Nonetheless, the sound-enabled participant, the excellent reader, and the poor reader are all getting exactly the same content. They are also all getting an interactive experience. Under these circumstances it is only reasonable that the two hour requirement be deemed met by all three learners even through their actual time learning the material varied from 1.5 hours to 2.0 hours to 4.0 hours.

The above concept is well established in education. The SAT is a timed test. Fast readers can use the time or not. Individuals with learning disabilities can get extra time ranging from 1.5 to 2.0 times the stated times. Nonetheless, all the students are graded on the same curve and given the same evaluation based on their scores. It is this same concept that should apply in the current case.

III. PROPOSED LANGUAGE

"At least two hours of classroom or other effective interactive training and education is required. This training may be continuous or divided into segments. For example, the training could be conducted in two one-hour segments taken over a two-year period, or divided into many segments of different lengths. However, the training shall not qualify as meeting the Statute's two-hour minimum requirement until at least two hours of the training has been completed.

"For classroom instruction the two hours shall be actual time devoted to the training. For interactive computer-based training, two hours shall be based on the sound-enabled version of the training. It is expected that the content covered in a typical two-hour sound enabled computer-based training will equal or exceed that covered in a typical two-hour classroom training. For a "read-only" version of the same sound-enabled interactive computer-based training, the two-hour requirement will continue to be based on the sound-enabled version. In determining compliance with the two-hour requirement, the employer may reasonably rely on the course developer's good faith designation of the typical training time necessary for the sound-enabled version of the interactive computer-based training. In the event no sound-enabled version of the computer-based training exists, the employer may reasonably rely on the course developer's good faith designation of the typical training time necessary to complete the no sound-enabled training. [Option One: However, such a training must contain at least as many words as would be presented in a sound-enabled two hour version of the training.][Option Two: However, such training must contain comparable or greater content that would be presented in a sound-enabled two hour vision of the training.]"

The above options present an objective standard (word count) and/or a subjective standard (comparable content). Employers like certainty, yet the purpose of the training is content.

INCLUSION OF OTHER FORMS OF HARASSMENT AND DISCRIMINATION

I. ISSUE

There is currently misunderstanding and an potentially great harm regarding whether California's new Government Code section 12950.1 mandates only sexual harassment training, or whether the training may include other types of harassment (racial, religious, sexual orientation, etc.) in addition to sexual harassment. On the other hand, there is the potential that the Statute "requires" coverage of other forms of harassment as part of the minimum two hour training. This presents to the Commission some of the most important issues that need to be decided. Should the FEHC issue a Regulation determining whether the two-hour minimum training can include more than sexual harassment training? Should the Regulation also determine whether two-hours of sexual harassment only training would meet the Statute's requirement?

II. DISCUSSION

A. Statutory Construction

According to the language of the statute, the training and education required by section 12950.1 "shall include information and practical guidance regarding the federal and state statutory provisions concerning the prohibition against and the prevention and correction of sexual harassment and the remedies available to victims of sexual harassment in employment." Cal. Gov. Code § 12950.1(a). The requirement does not end there: "[t]he training and education *shall* also include practical examples aimed at instructing supervisors in the prevention of *harassment, discrimination, and retaliation . . ..*" *Id*. (*emphasis added*). The clear interpretation of these words is that there is a MANDATE to include examples of how to prevent "harassment, discrimination, and retaliation" generally, not exclusively associated with sexual harassment. Moreover, the Statute provides that the training and education "shall be presented by trainers or educators with knowledge and expertise in the prevention of harassment, discrimination, and retaliation." Twice the Legislature intentionally did not confine harassment, discrimination and retaliation to sex, but allowed the terms to be used as they are in the FEHA.

Not withstanding the above mandates that extend beyond "sex,", the title of the Statute contains the phrase "sexual harassment training and education requirements." There is clearly an emphasis on sexual harassment in this legislation, including practical ways to prevent it as well as sexual discrimination and retaliation. At the same time the Statute suggests that the legislature is concerned not only with sexual harassment, but with other forms of harassment, discrimination, and retaliation, since the word "sexual" is noticeably and intentionally absent from the provision regarding practical examples, as explained above. Additionally, the Statute states, "[t]he training and education required by this section is intended to establish a minimum

threshold and should not discourage or relieve any employer from providing for longer, more frequent, or more elaborate training and education regarding workplace harassment or other forms of unlawful discrimination in order to meet its obligations to take all reasonable steps necessary to prevent and correct harassment and discrimination." § 12950.1(j). This language suggests that a training program that deals exclusively with sexual harassment would not fulfill an affirmative duty by the employer to "take all reasonable steps necessary to prevent and correct harassment and discrimination." *Id*.

Two observations become apparent when the statutory language is carefully considered. First, the Statute is focused on the prevention of sexual harassment and mandating training regarding this topic. Second, in accomplishing the purpose of the Statute practical examples of "harassment, discrimination, and retaliation" are required. Could an employer fulfill the purpose of this Statute by focusing on sexual harassment prevention, yet also provide practical examples of preventing racial harassment, discrimination and retaliation. The answer must be yes, including the realization that unlawful harassment, discrimination, and retaliation often does not come in discreet categories such as sex, race, etc. One can effectively teach sexual harassment prevention by including practical examples of other forms of harassment and how they are treated. The lessons often apply to all unlawful harassment as is illustrated by the fact that the definition of harassment set forth in Section 7287.6(b) of the Regulations covers harassment generally. Indeed this is the way the FEHA is structured. For the State of California to now segregate "sex" into an isolated two hour block, it would set the civil rights movement back twenty years or more. Clearly, this Statute was never written to punish an employer who provides two hours of sexual harassment prevention training, but includes some practical examples of other forms of harassment, discrimination, and retaliation. THIS NEEDS TO BE MADE EXPLICITLY CLEAR IN THE REGULATIONS.

The more difficult question is whether an employer that focused entirely on sexual harassment prevention for two hours and nothing else who meet the requirements of the Statute. While such a program would be ill advised and could actually violate other provisions of California law, such training could be interpreted as consistent with the language of Section 12950.1. When the Statute mandates that practical examples of "harassment, discrimination, and retaliation" shall be included, it DOES NOT MANDATE THAT ALL FORMS OF HARASSMENT, DISCRIMINATION, AND RETALIATION BE EXHIBITED. Practical examples of harassment, discrimination and retaliation could be limited to sex. Accordingly, a pure sexual harassment, sexual discrimination, and retaliation program would comply along with a training that use other examples of harassment, discrimination, and retaliation (such a race, religion, etc).

While I strongly support training that covers the full range of prohibited harassment, discrimination and retaliation, and encourage employers to undertake such training, it is difficult to read into the Statutory language that the practical examples must cover **ALL** prohibited forms of harassment, discrimination, and retaliation. While marital status harassment should be something that the employer could reference within the two-hour training, it is too great a leap to conclude that that is what the Legislature intended. Nonetheless, one should be **able** to provide an example of a married woman being harassed at work for failing to attend a singles party without fear that minutes will be deducted because the issue of marital status harassment may be involves as well as traditional sexual harassment issues.

The conclusion that seems the most supportable by the actual language of the Statute is that two hours of pure sex **or** two hours with a focus on sexual harassment combined with practical examples of some other forms of harassment, discrimination, or retaliation, would **both** meet the requirements of the Statute. This interpretation is absolutely consistent with the literal reading of the Statute, even though a two-hour program on pure sex would not be recommended nor would it likely meet other California legal requirements.

B. Legislative Intent

As recently as April 1, 2005, the Honorable Sarah Reyes, the author of AB 1825, stated, "AB 1825 does not say that it has to be solely, only, two hours of sexual harassment training . . . you can add additional training in there as well . . . this is a floor, not a ceiling . . . It's important to realize that a lot of the claims that are filed are not solely sexual." Partial Transcript from the 2005 Executive Employer Conference "Training Really is the Law" Session, April 1, 2005, Phoenix, AZ. Clearly, the intent of the legislature when drafting section 12950.1 was to emphasize sexual harassment training but also allow the inclusion of training on other forms of harassment, discrimination, and retaliation.

C. Policy

If section 12950.1's focus on sexual harassment is construed as limiting the content of the training to include only sexual harassment training, this would have serious negative implications for employers, employees, and the civil rights movement. Other forms of harassment, such as racial harassment, harassment based on age, national origin, disability, or one's religious beliefs are very serious problems in the workplace and often appear with claims of sexual harassment. Both the U.S. Supreme Court and the EEOC have directed that employers train employees in harassment and discrimination prevention on *all* protected categories. Indeed this has been the position of the FEHC and the DEFH. Employers responded to such suggestions, implementing effective training identifying all different forms of harassment. To construe section 12950.1 so narrowly and train solely on sexual harassment would be inconsistent with employers' overall obligations and is a giant step backwards.

Moreover limiting the two hour requirement to "sexual harassment only" open a Pandora's box of problems that would tie up massive resources in absolutely unnecessary and counterproductive litigation. Some of this analysis is obvious, while other parts of it are not.

First, sexual harassment training alone is not enough: An employer who narrows the scope of its training program to include only sexual harassment faces an invitation for liability. If an employer is only training supervisors on sexual harassment, the employer can no longer utilize the affirmative defense under federal law or the avoidable consequences doctrine under California law. The *Ellerth* and *Faragher* decisions of the U.S. Supreme Court allow an employer to defend itself to liability or damages if the employer can prove that it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." (*Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 765 (1998). Under the avoidable consequences doctrine as recognized in California, "a person injured by another's wrongful conduct will not be compensated for

damages that the injured person could have avoided by reasonable effort or expenditure." *Green v. Smith*, 261 Cal. App. 2d 392, (4th Dist. 1968). California courts extend this doctrine to apply to FEHA; "in a FEHA action against an employer for hostile environment . . . harassment by a supervisor, an employer may plead and prove a defense based on the avoidable consequences doctrine. *State Dept. of Health Services v. Superior Court*. 31 Cal. 4th 1026, 1044, (Cal. 2003). If an employer limits the scope of its supervisor training to sexual harassment, this prevents the employer from asserting these defenses in future claims of other forms of harassment and discrimination.

In order to avoid such a risk of liability, employers will be advised to include not only sexual harassment in their training programs, but also practical examples of other forms of harassment, discrimination, and retaliation. The regulations must make clear that training on harassment and discrimination in addition to sexual harassment training can and is encouraged to be included within the two hour requirement and will constitute compliance. It would be a outrageous and contrary to the purpose and history of the FEHA if an employer strives to develop the best training program possible, emphasizing sexual harassment but also including other forms of discrimination, only to be later held in noncompliance with section 12950.1 because there were not two full hours dedicated solely to the issue of sexual harassment. This is not the intent of the statute and the regulations must make this clear.

Second, merely adding more time beyond the two-hour requirement and covering other topics will invite a different kind of litigation: One solution to the above challenge is to do two and a half hours of training, or three or four hours, and cover all the categories. For many employers with sufficient resources this is the solution they have currently undertaken. **However, rarely do these programs segregate sex nor should they since that is not how these issues arise in the real world. If for any reason the FEHC interpreted the Section 12950.1 as requiring two hour of pure sex, the good employer is given the absurd task of segregating sex into one part of its training or trying to measure in minutes sex's coverage in its total program.** How does an employer measure the time spent on the doctrine of retaliation which applies to protecting one who complains of unlawful harassment (including sexual and racial harassment), but is displayed in an example that involves an African American woman. Is five minute out of ten given to the two hour requirement because race is also covered? Is all ten minutes used to review the practical example applied to the two hours? Or, is none of the ten minutes useable because it isn't pure sex?

THESE ARE QUESTIONS AN EMPLOYER SHOULD NEVER HAVE TO ANSWER!! Yet, these are exactly the questions that will be raised if the FEHC concluded that the two hours needed to be pure sex. Imagine the absurd issues that would enter conventional litigation with Plaintiff counsel attacking an employer's excellent prohibited harassment training, saying that only one hour out of the three can be attributed to sexual harassment prevention, thus the employer is in violation of Section 12950.1. To a jury this might sound like an employer trying to slip by with only half the training required by the State for preventing sexual harassment. The Plaintiff counsel could argue that half-measures are unlawful and shows that the employer is only half committed to preventing unlawful sexual harassment. **THIS IS NONSENSE! The employer has an excellent program doing exactly what the State of California and the US Supreme Court have encouraged for responsible employers.** I can guarantee that not one Legislator who voted for Section 12950.1 would have ever imagined such

an upside down result. Nor was such a result ever intended!

It gets worse! If the Statute was interpreted to cover only "sexual harassment, sex discrimination, and retaliation based on claims of sexual harassment and/or discrimination," many issues impacting women could not be included in the two hours. Section 12940(j)(4)(C) includes "sexual harassment" as only one form of "harassment" because of sex. Also included are gender harassment, harassment based on pregnancy, childbirth, or related medical conditions." Can these be included in the program as examples of "harassment, discrimination, and retaliation." ABSOLUTELY! But if the two-hours is limited to "sexual harassment" then these forms of harassment must be outside the two hours. This makes no sense and shows that there was obvious wisdom on the part of the Legislature in opening the door to a range of prohibited "harassments" that could be used as practical examples.

Third, there will be an unanticipated tangible cost to limiting the two hours to sex only that the Commission would need to quantify. There is yet another side to the employer's concerns about segregating unlawful harassment training. Training costs money and involves the valuable time of supervisors. From a governmental perspective, two hours may seem like a very short period. For a small business or an economically challenged business, it is not insignificant. The reality is that prior to Section 12950.1 notwithstanding all the advice Littler Mendelson can offer, a significant number of employers were doing less than two hours of total training on these important issues. Now thanks to Section 12950.1 there is a defining mandate that at least two hour of training must be done. Even reluctant employers will be forced to comply. For many it is an actual economic hardship to invest the full two hours. If that is all that the employer can do, then it should be the best two hour training experience possible. It can be focused on sexual harassment, but include at least some of the most important other categories. A Regulation that follows the exact language of the Statute and allows examples of "harassment, discrimination, and retaliation" permits at least a minimal coverage of other protected categories within the two hour period. This is also consistent with the Statute's directive that the training can be more "elaborate." However, a Regulation that interprets the Statute as pure sexual harassment prevention training (even with sex discrimination and retaliation included as is absolutely necessary no matter how distorted the reading of the Statute), this forces the exclusion of other protected categories from the two hours and is only redeemed if the employer can then increase the total training time substantially such that it can show that two hours of the training is on pure sex. **Without question this will place a significant additional cost on employers far beyond what the Legislature and the Governor contemplated in passing and signing AB 1825.** It is my understanding that such an unanticipated additional cost would need to be quantified and approved by the Finance Committee.

Fourth, allocating compliance by time devoted to protected categories would be destructive of the entire diversity and inclusion movement: Would the workplace be better protected if employers would undertake four hours of training on harassment, discrimination, and retaliation? Yes, but that is not yet the legislative standard. Moreover, even if four hours became the law, allocating time by protected category would be destructive. How much time does one spend on religious discrimination? Why is race discrimination getting less time that sexual harassment? Is sexual orientation harassment and discrimination part of the "sexual harassment" time quota, or not? What if the employer's most immediate problem was discrimination and harassment of Arab Americans? A time based formula with two-hours

devoted to pure sex invites comparisons that rip at the fabric of respect and inclusion. Prohibited harassment is as wrong and unlawful for age or national origin or religion, as it is for sex. Sexual harassment is a major problem in California and focusing on this topic provides a way of understanding the elements of harassment generally. Thereafter practical examples of harassment based on race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, martial status, age, or sexual orientation can be presented. Even more importantly combined examples can be presented showing that in practice harassment often does not come in a single form.

D. Recommendation

Based on the above, the proposed Regulation should reflect that the primary focus of the two hour training requirement is prevention of sexual harassment, discrimination and retaliation, but that it is permissible (and encouraged) that practical examples of other forms of harassment, discrimination, and retaliation be included in the two hour minimum training obligation. The Regulation should then strongly encourage employers to do more than the minimum and comprehensively cover all the protected categories. The Regulation can also make it clear that if a training program is limited to sexual harassment, discrimination, and retaliation it will meet the absolute minimum required by section 12950.1, but it is not consistent with the employer's overall obligations nor does it allow for the avoidable consequences defense for claims of other forms of harassment and discrimination (nor the federal affirmative defense).

The above recommended treatment enables Section 12950.1 to lead the nation in advancing the values of diversity, inclusion, and the prevention and correction of sexual harassment. On the other hand nothing would undermine civil rights more in California than limiting the two hours to pure sex. Rather than leading the nation, such an interpretation would brand California as a model for failure (or at best contradictory values). What started out as a vision and model legislature would be turned into a nightmare. I sincerely hope that regulatory language on this set of issues will be one of the easier tasks facing the Commisson.

II. PROPOSED LANGUAGE OF REGULATION

"Cal. Gov. Code § 12950.1 primarily is focused on the sexual harassment prevention training including the requirement of providing practical examples of harassment, discrimination, and retaliation. In addition to sex, these examples should include other forms of unlawful harassment, discrimination and retaliation as part of the two-hour requirement. Many times sexual harassment is combined with other forms of harassment, discrimination, or retaliation such as race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, age, or sexual orientation. The requirement of Section 12950.1 is a minimum standard and employers are strongly advised to provide for longer, more frequent, or more elaborate training and education regarding workplace harassment or other forms of unlawful discrimination besides sexual discrimination. It is important that the full range of unlawful harassment, discrimination and retaliation be covered in employer training programs to be entirely consistent with Cal. Gov. Code Section 12950.1(j) and good practice."

OUT-OF-STATE SUPERVISORY EMPLOYEES

I. ISSUE

California's new Government Code section 12950.1 requires employers having 50 or more employees to provide harassment training "to all supervisory employees." Cal. Gov. Code § 12950.1(a). It is unclear from the statute whether this language shall include out-of-state supervisory employees. The FEHC should provide a Regulation on whether out-of-state supervisory employees supervising California employees are mandated by section 12950.1 to receive the required training.

II. DISCUSSION

The language of the statute arguably indicates that it is intended to cover out-of-state supervisory employees so long as they supervise California employees. The statute states that the training shall be given to "*all* supervisory employees." § 12950.1(a). (*emphasis added*). While it is arguably unnecessary for a national company with 50 or more employees in California to train every supervisory employee within the company, at a minimum it makes sense to train any and all supervisory employees who supervise employees located in California.

To only provide training to the supervisory employees in California could be very problematic. It would be detrimental for employers to have inconsistent training policies for supervisory employees located in California and those located outside of California. A situation may arises where supervisory employees in California receive training on certain content and supervisory employees for the *same employer* who are located out-of-state do not receive such content. This could be construed as a lack of reasonable effort on the part of an employer to help prevent workplace harassment. It is clear that the intent of section 12950.1 is to prevent and correct workplace harassment for California employees. These employees should not suffer because some of their supervisory employees received more exhaustive training than others.

It is not difficult to imagine a situation where an employer has locations both in and out of California, and one of the California employees experiences a serious harassment incident while working with his or her out-of-state supervisor. In such a case, there is a strong argument that the supervisory employees, even though out-of-state, should have received the same training as those in California since they supervised California employees. The statute primarily benefits California employees and to have inconsistencies in who is being trained could negatively affect these employees.

Under California law, a supervisor who harasses another employee may be held personally liable regardless of the employer's liability. Cal. Gov. Code § 12940(j)(3). If the supervisor of a California employee is located outside of California, the court would conduct a "minimum contacts" analysis to determine if California has personal jurisdiction over the alleged harasser. The results of this analysis will depend on the factual circumstances. The nonresident

defendant must have sufficient minimum contacts with the forum state such that exercise of personal jurisdiction does not offend "traditional standards of fair play and substantial justice." *International Shoe Co. v. State of Washington*, 326 U.S. 310, 316 (1945). There are certainly circumstances where an out-of-state supervisor will have sufficient minimum contacts with the state of California such that California can exercise general or specific jurisdiction over the individual. If there is ever any harassment incident involving California employees and their out-of-state supervisory employee, there is a strong argument that the out-of-state supervisory employee should have received the training mandated by § 12950.1. Of course each of these cases would require an independent analysis of the minimum contacts needed to assert jurisdiction over the individual.

III. PROPOSED LANGUAGE

"For the purposes of Gov. Code § 12950.1, "supervisory employees" shall not be limited to supervisory employees located in California. The term "supervisory employees" includes any supervisory employee who supervises California employees, and has the necessary minimum contacts with California. Generally, the more directly the "supervisory employee" controls, directs, or impacts the working conditions of California employees, the greater is the likelihood that the requirements of Section 12950.1 apply."

WHAT IS "KNOWLEDGE AND EXPERTISE"?

CERTIFICATION

I. ISSUE

Section 12950.1(a) requires that sexual harassment training "be presented by trainers or educators with 'knowledge and expertise' in the prevention of harassment, discrimination, and retaliation."

A) What constitutes sufficient "knowledge and expertise?"

B) Should there be a certification process for trainers or educators?

II. DISCUSSION

A. "Knowledge and Expertise"

Sarah Reyes, author of A.B. 1825, made it clear that there was an importance difference between "knowledge"[1] and "expertise"[2] in the drafting of the statute. Reyes pointed out that the bill initially said "knowledge" and did not mention "expertise." The Legislature realized, however, that while many people had "knowledge," very few had "expertise." By including "expertise," Reyes meant that one would have to have experience—an understanding of the law, and an understanding of what is being taught. Reyes anticipated that the regulations would specify some experience level, whether it would be an amount of years, an amount of training, or the level of experience that one should have in dealing with harassment, discrimination, and retailation.

As for the "knowledge" requirement, the Regulation should include a non-exhaustive list of people who would have sufficient knowledge to meet the requirements of the statute. The list naturally would include employment lawyers and human resource professionals, but would also include "others who have knowledge of California laws prohibiting sexual and other prohibited harassment, discrimination and retaliation." This recognizes that there will be individuals who may have sufficient knowledge based on their background, e.g., victims of sexual harassment, consultants, and paralegals. Limiting the list by imposing career or educational requirements would unduly exclude such individuals.

As for the "expertise" requirement, as Sarah Reyes anticipated, a minimum amount of experience should be specified in the regulations. Experience could be measured by an amount of years (e.g., "at least five years of practical experience dealing with sexual harassment issues"), or specialized training such as law school or a degree in Human Relations. The most practicable requirement would be five years of experience or some combination of experience and advanced

[1] According to the American Heritage Dictionary, "knowledge" is "familiarity, awareness, or understanding gained through experience or study," or "the sum or range of what has been perceived, discovered, or learned."
[2] "Expertise" is defined as "specialized knowledge or skill," or "expert advice or opinion." "Expert" is defined as "having or demonstrating great skill, dexterity, or knowledge as the result of experience or training."

education. This would eliminate those individuals with limited experience (without offsetting formal educational backgrounds) while not being overly burdensome in requiring employers to hire only highly experienced individuals in the field.

For live, in-person training, the standard for the trainer or educator needs to go beyond merely knowledge of the content of the actual presentation. Trainers and educators must be able to answer questions from the trainees. To do so, trainers and educators will need to draw both from their knowledge of the law and from their experience. Strong communication and other interpersonal skills are also desirable traits of trainers or educators in that such traits increase the likelihood of an effective presentation. Clearly the course could be designed by one or more individuals with superior knowledge and experience, but it is also important that the presenter have at least the minimum levels of knowledge and/or experience discussed above. In live instruction it is much harder to draw on resource guides and built in information. On the other hand, the instructor can research a question and provide a more detailed answer at a later time.

Regarding computer-based training it is important to distinguish between the computer programmer or the party providing the technology, and the content embedded in the technology. Clearly the content must come from those who have superior knowledge and expertise. This is absolutely essential as designing an effective program will involve anticipating user responses and needs. Meanwhile, those who actually put the technical system together do not need to know the content. As Reyes opined, knowledge and expertise comes not from the computer program itself, but from who developed the program. In "webinars" and other computerized programs that involve a human trainer or educator, the "knowledge and expertise" requirement will also apply.

Whether a "trainer or educator" has sufficient "knowledge and expertise" ultimately will be resolved in litigation. Thus, employers have an incentive to seek only individuals who they believe are qualified to provide training that will meet the requirements of the statute.

B. Certification

Certification would permit employers to ascertain which training providers meet the requirements of Section 12950.1. It would likely reduce or eliminate the problem of charlatans and other unqualified trainers and educators. On the other hand, certification would be costly and difficult to administer. Most people in attendance at the Committee meeting seemed to agree that a certification program would be impracticable. If the FEHC provides some guidelines, the enforcement will come in litigation in the same manner as Section 12950.1 is enforced generally.

One feasible option would be to have optional certification by attorneys with experience and expertise. Review and approval of a training program by attorneys could create a rebuttable presumption that a training program meets the requirements of the statute.[3]

[3] This may deal more with content than with training.

III. PROPOSED LANGUAGE

"Trainers or educators" must have knowledge and expertise regarding California and federal laws prohibiting sexual and other prohibited harassment, discrimination and retaliation and experience in training. Generally "trainers or educators" who have five years or more experience in training or education involving prohibiting, preventing, or correcting sexual and other prohibited harassment, discrimination, and retaliation will qualify under the Statute. If experience is less than five years, the knowledge and expertise must be supplemented by proven formal training such as law school or a degree or nationally recognized certification in human resources. Meanwhile developers of content for training programs whether live or on-line should have superior knowledge and expertise. Employers shall be responsible for performing due diligence regarding content that is used in training. Review of the content by an attorney licensed to practice law in California will establish a reputable presumption of compliance. Educational products provided by third parties may announce or advertise compliance with Section 12950.1 only if the third-party provider has received such an opinion from a qualified attorney licensed to practice law in California."

ENFORCEMENT

I. ISSUE

Section 12950.1 of the California Government Code provides that if an employer fails to comply with the statute, the Commission shall issue an order requiring the employer to comply with the requirements of the statute. Should the regulations provide for any other enforcement schemes?

II. DISCUSSION

Sarah Reyes, author of A.B. 1825, noted that while it is true that California Government Code section 12950.1 itself has no penalties other than the issuance of an order requiring the employer to comply with the statute, the law will be enforced indirectly through litigation. The issue of mandatory training will be implicated in actions alleging sexual harassment as it is now regarding all forms of prohibited harassment. Plaintiffs (or plaintiffs' attorneys) will almost certainly argue that the failure to meet the training mandates is partial evidence of an employer's failure to take all reasonable steps to prevent harassment. Employers will point to their compliance to defend against a harassment claim (although compliance with the statute will not automatically insulate employers from liability). Thus, the incentive for the employer to comply is already present in the Statute. California employers that ignore the training requirements face the possibility of a judgment against them that includes exorbitant compensatory and punitive damages, attorneys' fees and costs.

One matter that was raised is whether the Commission should issue advisory opinions when the issue of compliance comes up in a harassment lawsuit. While issuing advisory

opinions would be useful, doing so would probably be too costly and impracticable. The Commission could, however, selectively choose to issue advisory opinions in unique circumstances. Such opinions would offer further guidance to employers and others interpreting the statute.

III. PROPOSED LANGUAGE OF REGULATION

[No regulation is needed to clarify what happens when an employer does not comply with the training requirements, as it is unambiguous in section 12950.1(e)].

50 EMPLOYEES

I. ISSUE

California Government Code Section 12950.1 (2003-2004's A.B. 1825) applies to employers that regularly employ 50 or more employees or regularly receive the services of 50 or more persons pursuant to a contract.[4] Does this minimum employee requirement mean 50 employees in California, or 50 employees in any state?

II. DISCUSSION

A California court has held that the Fair Employment and Housing Act's (FEHA) other minimum employee requirements count only employees working in California.

In *Clopton v. Global Computer Assoc.*, 1995 U.S. Dist. LEXIS 6376, 1995 WL 419831 (C.D. Cal. Mar. 27, 1995), the court held that a FEHA minimum employee requirement does not apply to an out-of-state employer that hires California residents when that employer does not employ at least five employees within California. The case addressed a FEHA physical disability claim under California Government Code Section 12940. California Government Code section 12926(d)(1) defines an "employer" for purposes of FEHA as "any person regularly employing five or more persons, or any person acting as an agent of an employer, directly or indirectly . . ." The court agreed with the Company that the provisions did not apply to the Company, as it had less than five employees in California.

Clopton is contrary to a publication of the Department of Fair Employment and Housing (DFEH) which says that to determine whether an employer is covered under FEHA, in "counting the number of 'persons employed,' both full-time and part-time employees who are 'regularly' employed within or outside of the State of California should be counted." DFEH Case Analysis Manual, Vol. II §17(C)(1)(a) (Dec. 26, 1990).

Likewise, an official regulation interpreting the family care and medical leave provision[5] of the California Family Rights Act (which similarly applies only to companies with more than

[4] The statute also applies to any person acting as an agent of an employer, directly or indirectly, and the state, or any political or civil subdivision of the state, and cities.
[5] CAL. GOV'T CODE § 12945.2 (West 2005).

50 employees) says employers should count all "persons within any State of the United States, the District of Columbia or any Territory or possession of the United States. " CAL. CODE REGS. tit. 2, § 7297.0(d) (2005).

In Connecticut, a regulation interpreting a similar provision states that "Employer Having Fifty or More Employees" means ". . . any person or employer who has a total of fifty or more persons, including supervisory and managerial employees and partners, in his employ for a minimum of thirteen weeks during the previous training year. CONN. AGENCIES REGS. § 46a-54-200 (2005). Based on a literal reading of the regulation, Connecticut imposes the requirement of having 50 employees anywhere, rather than within the state.

Ultimately, given the legislative intent of Section 12950.1, which was to limit the requirement to employers with 50 or more employees in California, and the authority of *Clopton*, it is reasonable for the Commission to interpret the statute to apply only to employers with 50 or more employees in California. The costs of enforcing compliance of employers with 50 or more employees with only a minimal number of employees in California would likely outweigh the benefits of the additional training.

In practice any employer in the nation with 50 or more employees should be doing at least basic training regarding prohibited harassment, discrimination, and retaliation. Nonetheless, trying to reach such employers with fewer than 50 employees in California seem to create a potential unfair comparison. One employer in California may have a total of 40 employees, meanwhile another employer with 50 employees total might have only one in California. While both employers should be doing training, to mandate the specific training required by Section 12950.1 to apply to the employer with one California employee and not to the employer with 40 California employees does not seem to be advancing the interests of California law in a parallel manner.

III. PROPOSED LANGUAGE OF REGULATION

For purposes of Section 12950.1 only, "employer" means any person regularly employing 50 or more persons within the state of California or regularly receiving the services of 50 or more persons providing services pursuant to a contract within the state of California, or any person acting as an agent of an employer, directly or indirectly, the state, or any political or civil subdivision of the state, and cites.

MANDATORY CONTENT

I. ISSUE

California Government Code Section 12950.1 mandates sexual harassment training for supervisory employees by January 1, 2006. Although the statute articulates some mandatory content for the training, detailed information regarding mandatory content is not included. Therefore, should the FEHC further define the required mandatory content of Section 12950.1 training in its implementing regulations?

II. DISCUSSION

California Government Code Section 12950.1 requires that employers with 50 or more employees provide its supervisory employees with two (2) hours of mandatory harassment training focusing on sexual harassment by January 1, 2006. More specifically, the statute states that the training shall include information and practical guidance regarding federal and state provisions about prohibition against and prevention and correction of sexual harassment and the remedies available to victims of sexual harassment in employment. Further, the statute states that the training shall also include practical examples to instruct supervisors in the prevention of harassment discrimination, and retaliation. Clearly the statues calls for a practical approach to the mandatory training under Section 12950.1, but it is left to the Fair Employment and Housing Commission to articulate the specific requirements for achieving that practical approach.

California law currently requires employers to provide employees with information regarding sexual harassment in two (2) ways separate from California Government Code Section 12950.1. First, California maintains a posting requirement whereby employers must display a state poster relating to sexual harassment in plain view for employees. Second, California Government Code Section 12950 (b) lists seven (7) informational requirements concerning content about sexual harassment that must be distributed to employees. The new law is in addition to these requirements and should serve as a complement to the existing requirements, as opposed to a mere repetition of previously provided information. Further, the content of the mandatory training should be such that national employers can implement it on a nationwide basis, while ensuring that it provides adequate knowledge to supervisors to prepare them for any significant differences in California.

A. Guiding Principles In Building Effective Content—Putting The Content Requirement of Section 12950.1 Into a Practical Learning Context.

Based on over three decades of working with employers to implement and enforce federal and state laws protecting the workplace, I have supervised or conducted training for several hundred thousand supervisors and employees. From this experience and the experience of scores of other attorneys in my firm, there are certain conclusions we have reached that bare directly on the mandatory content that the FEHC should identify in its regulations.

First, **use practical examples:** Supervisors, managers and employees learn best from **practical examples** of the types of conduct that are prohibited, practical examples of preventive measures, and practical examples of how to react when they observe prohibited conduct or it is reported to them. This theme this at the heart of Section 12950.1 and is one of its greatest strengths. Explanations, formulas, and memorized lists fade into insignificance compared with the teaching power of practical examples preferably placed in the context of a vignette.

Second, **avoid codes sections, case citations, or unnecessarily technical definitions:** Presentations of code sections, case citations, and recitation of technical statutory or regulatory language have almost no value and often do harm by causing the supervisor or employee to stop listening. Moreover, less than 1 in 100 will remember such information. When and if such

information is needed it is immediately available from existing sources including the mandatory posting, the mandatory handout, and the Internet**. No code sections, case citations, or unnecessarily technical definitions should be required.** Supervisors will need to know the employer's policies, and the employer will be held responsible to establish that its policies and procedures meet all legal requirements.

Third, **emphasize the positive values behind the legal requirements:** the goal of training and education is to support the values of building a workplace of respect. Supervisors should be ambassadors for these values both by the their conduct and the policies they enforce. Supervisors learn that both federal and state law are designed to protect these values and that apart from being legal requirements, these laws (values) help create a workplace of respect and cooperation, that is MORE PRODUCTIVE than a workplace where these values are absent or not enforced. Recruiting and retention are better, attendance and attitude toward work improve, and productivity actually increases.

Fourth, **teach issue spotting, reporting (and for some employers investigation skills) as opposed to making legal judgments:** Supervisors need to know the employer's policies and the general rules, such that they can practice these values and serve as the eyes and ears of the employer. They need to recognize when something may be wrong or in need of investigation. They are not human resources professionals, lawyers, or Administrative Law Judges, required to make fine judgments about what is pervasive or severe misconduct that rises to the level of unlawful sexual or racial harassment. Their duty is to identify misconduct even before it reaches the level of being unlawful and see that the situation is investigated and corrected. In some organizations the investigation is done entirely by HR Professionals, in other organizations the supervisor is trained to do the initial investigation. Almost always an HR Professional, a lawyer, or a very experience manager will make the final judgment concerning a violation of policy or law. Accordingly, the key skill needed by the supervisor is the ability to detect POTENTIAL misconduct and see that it is quickly addressed by the employer. ISSUE SPOTTING is vital as opposed to extensive teaching regarding the actual evaluation of what is legal and illegal conduct based on subtitle distinctions that even judges may find challenging. A good program would teach a supervisor who spotted a single instance of racial or sexual graffiti to immediately report it to HR, make sure other offensive graffiti was not present, and follow up on both the removal of the graffiti and an investigation of who was responsible for its creation so as to prevent a reoccurrence. A poor program would teach the supervisor that a single incident of graffiti rarely can create a pervasive or severe environment so as to rise to the level of being unlawful, and accordingly the supervisor can simply monitor it to see if more appears or have the graffiti removed without reporting it to HR or seeing that its origin was investigated.

Fifth, teach only those legal requirements relevant to the supervisor's duties: As presented above a core message of excellent harassment prevention training is establishing that such prevention, detection, and correction is vital to the future success of the organization, including the organization's need to comply with legal requirements. Necessary and practical information should be given to the supervisor, but technical legal differences between federal and state law that do not impact the duties or behavior of the supervisor or the ability of the supervisor to properly care out his or her role, should not be required as part of the training. A common test in building content is to ask whether the information being taught is necessary for the supervisor to effectively carry out his or her role, including the role of being part of the

employer's legal compliance process. If the answer is no such information is generally not included unless directed to do so by a case, statute, or regulation. Hopefully, the FEHC would not mandate by regulation information that is not required by Section 12950.1, that is unnecessary duplicative of the existing poster and handout requirements, or that does not contributed to the compliance function.

B. Analysis of the Specific Section 12950.1 Requirements.

1. "Information and practical guidance regarding federal and state statutory provisions concerning the prohibition against and the prevention and correction of sexual harassment...."

This is a very general command regarding what needs to be presented; however, it is significant that the word "practical" is used and repeated elsewhere in the Statute. Clearly a major objective of the Legislature was to make the law regarding sexual harassment understandable and meaningful for supervisors. The term "information and practical guidance regarding" wisely does NOT require that statutory language be quoted as it would be worse than meaningless to the average supervisor, leading to confusion rather than understanding. First, under federal law there is no direct statutory language. Nonetheless there is a well established definition that has been developed in the EEOC Regulations and frequently reviewed in the case law. Second, under state law there is a direct statutory mandate to not engage in "sexual harassment" but no explicit definition. The closest statutory language to a definition is Section 12940(j)(4)(C), "For the purposes of this subdivision "harassment" because of sex includes sexual harassment, gender harassment, and harassment based on pregnancy, childbirth, or related medical conditions." This suggests that prohibited harassment because of sex is actually made up of many elements only one of which is "sexual harassment." Clearly the Legislature intended that "sexual harassment" be defined by Regulation and case law (a methodology that has worked reasonably well especially with the definition set forth in existing regulations).

Section 12950.1 was not passed in isolation nor was it the first legislation requiring employers to provide information on the prohibition of sexual harassment to all employees, including supervisors. Section 12950 requires a poster prepared by the DFEH to be placed in a location available to all employees. Additionally in California each employee is to receive the equivalent of an information sheet with seven components including announcing that sexual harassment is unlawful, providing a definition, and giving examples. Form DFEH-185 (revised April 2004) meets this requirement. Meanwhile existing regulations provide a workable definition of "harassment" (Section 7287.6(b)(1) and Section 7291.1(f)(1). One of the strongest advantages of the definition is that it's focus is on "harassment" not only "sexual harassment." In Section 7291.1(f)(1) that directly addresses "sexual harassment" reference is made to the general definition (Section 7287.6(b)) and summarized as including "verbal, physical, and visual harassment, as well as unwanted sexual advances."

When one undertakes a careful study of the EEOC's definition of sexual harassment and compares it with the California and Connecticut definitions, there is no substantive difference. While there are technical differences that flow from the fact that the prohibition is court made at the federal level and statutory at the state level, the definitions on their face are for all practical purposes parallel. Since one of the main purposes of Section 12950.1 is to train supervisors on

identifying, preventing and correcting "sexual harassment" (as well as other forms of prohibited harassment), then what is needed is a practical and working knowledge of what constitute potential prohibited harassment. Fundamentally this will develop through experiencing several examples of prohibited harassment. **What should be avoided is trying to apply one definition under federal law and a different one under state law. Not only would this be difficult for a California attorney, it provides no value to improving California workplaces or preventing and correcting sexual harassment potentially impacting California employees. If the training program presents a practical understanding of sexual harassment that is consistent with what is covered by both federal and state law, it should be not only acceptable under Section 12950.1, it should be commended.**

When the training program concludes supervisors should have been made aware that prohibited harassment (including sexual harassment) could be verbal, physical or visual and include unwanted sexual advances. Supervisors should know that harassment might be economic (tangible) such as linking a rise or promotion to a sexual favor, or environmental in the form of unwelcome and offensive verbal, physical or visual behavior or displays that impact working conditions. They should know that this is prohibited and will not be tolerated by their employer. Whether the supervisor can related this back to a federal definition or a state supplied definition is counterproductive and in the vast majority of situations absolutely irrelevant. The definition that will matter to the supervisor is the one in the employer's policy since it will cover the universe of what California and the federal government have prohibited and in most cases be even more restrictive. For example a single event of unwelcome touching would be more than sufficient for most employers to discipline or terminate the offending employee, yet may very well not rise to the level of unlawful sexual harassment under federal and state law. No employer wants its supervisors making "field judgments" regarding whether such conduct is sexual harassment under federal or state law. What is essential is that the supervisor know that such activity is wrong, contrary to policy and may even be unlawful. It will get reported and carefully evaluated by those who can make sure that the employer's actions are at least as much as would be required by law (federal, state or local).

The absolute best way for supervisors to learn the definition of prohibited harassment (including sexual harassment) will be through examples that show how verbal behavior can be prohibited harassment, how physical behavior can be prohibited harassment, and how visual behavior could be prohibited harassment. The supervisors being educated and trained under this Section are employed along with at least 50 employees. The vast majority of those trained will be from employers having 250 or more employees. Accordingly, the employer will have access to resource that can professionally evaluate situations for technical legal compliance.

2. "[A]nd the remedies available to victims of sexual harassment in employment."

This requirement should primarily include internal compliant procedures available to victims such that the employer can carry out the mission of correcting violations and immediately addressing the needs of victims. This is consistent with the reasoning behind the affirmative defense (federal law) and the avoidable consequences doctrine (California law). The

fact that offensive behavior might also be a violation of federal and/or state law means that remedies through the courts may also be available. This is covered in the Postings and California DFEH Form 185 and might not need repeating for effective training. However, since Section 12950.1 explicitly requires a presentation of "remedies" to supervisors, they should know that they could be personally liable for prohibited harassment that they cause, as well as the availability of back pay, reinstatement, damages and injunctive relief. These basic remedies are listed on DFEH Form 185 and should meet the requirements of Section 12950.1, should anything beyond internal remedies be required. Mandating anything more specific on remedies would have almost no meaning to supervisors and could become endless.

3. "[I]nclude practical examples aimed at instructing supervisors in the prevention of harassment, discrimination, and retaliation...."

This is the heart of the training mandate. These words have been extensively reviewed above and the reader will be spared a duplicative analysis. The conclusion reached above is that this language allows employers to use examples based on any prohibited harassment, discrimination or retaliation, including sexual harassment, sex discrimination, or retaliation based on making a complaint about alleged sexual harassment or sex discrimination. It does not require all forms of prohibited harassment, discrimination and retaliation to be listed. Meanwhile, employers should be encourage to provide comprehensive training that does more than the minimum required by Section 12950.1.

C. Section 12950.1 Content Requirements Should Not Developed With A Recognition That Many Employers Will Seek To Use Their Training Nationally.

Organizations that do business in California have a high likelihood of doing business in other states as well. In addition, it is well know that California's employment and labor laws are closely followed and that the State has started several national trends. Many employers build their policies and procedures to cover California requirements, knowing that this will generally meet state requirements across the nation. We are aware of several national employers who have been prompted by California Government Code Section 12950.1 to roll out training programs nationally. Moreover, to the extent that the term "supervisors" includes those who are outside of California supervising California employees, such national training has an added benefit. Additionally a defacto training requirement exists independent of Section 12950.1 under both federal and state law.

Regarding the training itself it should cover what is necessary to meet California law, but the employer should be allowed to develop the training in a way that is consistent with its local, state, national, and even global business objectives. Building in obstacles to a national program or requiring unnecessary customization increases the costs to employers and defeats the interests of California. The State wants national employers and in turn California employers want to be able to appropriately expand nationally and globally while making efforts to establish core values and minimum standards for every part of its organization. Accordingly, avoiding the need to reference exact statutory language, specific codes sections, and case cites facilitates building national programs.

Avoiding the above technical references to California code sections and case citations does not mean that California requirements are in any way ignored. The substantive content must be fully consistent with California law. For example, providing information and an example of how sexual favoritism is prohibited by an employer, is consistent with new California Supreme Court law, complies with most employer's policies, yet does not need to be footnoted to a case citation. As lawyers we often enjoy seeing such linkage and knowing that we can look up the full case for more details, but for a supervisor what is relevant is the sexual favoritism is wrong and should be reported. It is unnecessary and dangerous for front line supervisors to instead try to make field judgments regarding whether the sexual favoritism is sufficiently severe as to be unlawful under California's new Supreme Court decision. The supervisor will learn that such favoritism is wrong, may be unlawful, and must be reported and corrected. Clearly this accomplishes the underlying objective of Section 12950.1 of preventing sexual harassment and other prohibited harassment.

Training in accordance with the statute's intent to provide practical guidelines to prevent and avoid sexual and other types of harassment is optimum for a nationwide training program. Specifically, because definitions of sexual and other types of harassment are substantially similar throughout the state and federal laws, instruction on avoiding inappropriate behavior can be universal across the country. Therefore, the Commission should seek to enact implementing regulations that are not so specific that they defeat the ability of employers to enact nationwide training programs that comply with Section 12950.1. In addition, the Commission should seek to enact implementing regulations that are not so specific that they require the Commission or employers to update their respective regulations and training programs each time a new case regarding sexual and/or other forms of harassment is decided. This way, the mandatory training will not make the mistake of attempting to turn supervisors into lawyers, but instead can focus on giving practical ways for supervisors to prevent sexual and other forms of harassment.

III. PROPOSED LANGUAGE

The training mandated by Cal. Gov't. Code § 12950.1 shall include, information and practical guidance regarding the prohibition, prevention, and correction of sexual harassment in the workplace. In carrying out this mandate it is required that practical examples be used of prohibited harassment, discrimination and retaliation. These examples may include prohibited harassment, discrimination and retaliation based on any or all of the protected categories identified in Section 12940 (j)(1), and such examples may be applied to meet the minimum two-hour training requirement. Nonetheless it is encouraged that training be lengthened, conducted more frequently, or made more elaborate to cover prohibited workplace harassment or other forms of unlawful discrimination.

In meeting the above minimum requirements, a variety of content and teaching methods may be employed to make the training effective. The information, practical guidelines, and practical examples should be made understandable minimizing the use of code references, case citations or unnecessary legal jargon. The use of vignettes, or stories incorporating events from actual cases are encouraged as a way providing practical examples and increasing the effectiveness of the training.

The training should provide knowledge and teach skills regarding to regarding detection, identification, prevention and correction of prohibited harassment, discrimination, and retaliation at least including sexual harassment, sexual discrimination and retaliation. It is encouraged that that such training also provide similar knowledge and teach skills involving other prohibited harassment, discrimination and retaliation. [In reach reference below to prohibited harassment, discrimination, and retaliation, the same required and encourage directive should be given. The exact language can be finalized when the list of required and encourage duties is finalized.]

Training shall include information on the importance of the supervisor's role in receiving and quickly acting on employee complaints of prohibited harassment, discrimination, or retaliation, as well as independently recognizing behavior or situations that could constitute such prohibited harassment, discrimination, or retaliation. Supervisors shall be informed regarding the employer's complaint procedures and their role in effectively carrying out such procedures. This may include information regarding internal notification requirements to human resources personnel and/or senior management. Supervisors may also be trained regarding initial investigations of possible prohibited harassment, discrimination, or retaliation, consistent with the employer's policies and other available resources for carrying out such investigations (such as human resources professionals). Supervisors may receive examples of how they can prevent and correct prohibited harassment, discrimination, or retaliation.

Supervisors shall be provided information and training regarding the internal remedies that are available to prevent and correct prohibited harassment, discrimination, and retaliation. Additionally supervisors shall be informed regarding their personal liability for prohibited harassment and certain other governmental remedies for prohibited and unlawful harassment, discrimination, or retaliation. These remedies potential include backpay, reinstatement, damages and/or injunctive relief.

Documentation of Completed Training: The employer shall maintain or cause to be maintained a written or electronic record of completed training. This record shall identify the individuals trained, the dates and times of the training, and whether the training was completed, and how and by whom the course was provided. If the course content was developed by someone other than the presenter, this information shall be provided. Additionally, the record shall show the training course(s) taken and completed including the content of such training. Evidence of course completion can be a signed (manually or electronically) acknowledgement of completion. Course content may be shown through any or all of the following: a detailed course outline, slides used, or in the case of web-based or on-line courses, the actual or similar courses taken. These records shall be available for four years. [More work is needed on the documentation, but this is an important issue for employers and could be important if a case is litigated.]

How to respond to reports of sexual and other forms of harassment;

1. How to report up line sexual and other forms of harassment; and
2. How to prevent sexual and other forms of harassment in the workplace.

[Commission note: Email sent by Garry Matthiason, Littler Mendelson, 11/10/05]

Ann, I am contacting LLG (The Littler Live Instruction Group) to have them send you a paper they have prepared on the value of Training and the Washington State Study. This is a critical study in that it involves the training of every supervisor in State Government in Washington showing a dramatic decline in lawsuits and the cost of settlements (as I recall about 37%).

Meanwhile the cost of training will vary dramatically depending upon the size of the business. For a very large employer ELT's on-line AB1825 training can reach as low as $10 per seat (per supervisor). The live instruction is about $2000 per session. If 50 supervisors are in the session then the per person cost is about $40.00. If a company schedules multiple session the per session cost can be reduced. I envision that this is our high/low range. I am not sure what is charged for the web-live instruction (with interactivity). I am sure one of the people receiving this e-mail will have those details. I will follow up tomorrow to make sure you get the Washington State information and the publication that Littler's Legal Learning Group has put together.

Regarding the number of employers with 50 or more employees, I am uncertain. I actually tried to determine this from State of California web-based materials and couldn't. I am certain someone in Finance will have that information in very precise numbers. EDD could easily generate this type of information (without disclosing names).

Please let me know how we can help you. It is a pleasure to work with you. The FEHC is fortunate to have you! Garry

Comments to the Fair Employment and Housing Commission Regarding AB1825 Implementing Regulations

By
Paul Schechter, Employment Law Counsel
California Chamber of Commerce

[Commission Note: Submitted 8/23/05]

Introduction - The purpose of the law is to obligate larger employers and encourage smaller employers to educate their supervisory staff in a manner that works for that company to identify, prevent and remedy sexual harassment thereby improving the environment in California workplaces. The purpose is not to create an industry of professionals or companies who become, by intent or implication, the only approved providers of compliant training.

After more than seven months of providing supervisor sexual harassment training solutions through on-line training and webinars, we have learned that no one solution works for every employer. They are influenced by economics, production schedules, work schedules, number of locations, level of supervisor computer sophistication, IT resources, language issues, rate of turnover, etc. The purpose of these comments therefore is to encourage the Commission to recognize the need to be inclusive rather than exclusive in its regulatory action and instead provide employers with criteria and standards they can refer to in determining how best to meet the training obligation.

Interactivity –The law contemplates a broad spectrum of training options when it adopts "classroom or other effective interactive training and education" for its requirements, recognizing that the fulfillment of its purpose will require that employers be free to chose a compliant form of training suitable for its workplace, its workforce and its work schedules. While the live classroom setting provides the *potential* for the highest degree of interactive training, even that is no guarantee that every seat will be filled by an individual that participates in the opportunity to interact with the instructor or the others in the room. Moreover it is impractical to conclude, based on limited availability of sophisticated trainers and economics, that this mode of training will be available to all companies.

The legislature did not define "interactive" arguably recognizing that, in order to get the job done, a variety of training methods must be acceptable. The law does not require classroom training, and it does not mandate an *optimal level* of interactivity. Defining those criteria that make training interactive would be helpful, but the operative word should be, "effective."

Regulations therefore should avoid enumerating or eliminating any particular means of delivering training. Rather, regulations should describe a range of elements that are likely

to make an *effective learning experience* and to which employers may refer when evaluating a particular method. These may include:

- Direct or "virtual" role playing,
- Checkpoints requiring responses along the way that assure understanding,
- The opportunity to question or comment on the learnings and get prompt feedback from a knowledgeable source,
- Retainable evidence of full participation for the required time,
- Retainable evidence of comprehension, etc.

The report of discussion of "webinars" during the July 20 meeting is a good example of how a statement of such criteria would be helpful. The California Chamber of Commerce offers sexual harassment training in three of the major formats, video, on-line and webinar. Thus we have no "vested interest" in any one vehicle.

Our first effort at AB1825-compliant webinar training, which you attended, gave us a good perspective on how that medium can be improved. Our next efforts with that medium will include downloadable hard copy scorecards that each participant will be required to complete and provide to company management indicating and certifying his or her participation in the training. The issues reflected in the scorecard will be presented throughout the webinar so that completion of the scorecard will require the participant to attend and be attentive throughout the entire period. As before, the webinar will include real-life examples requiring participants to identify, react to and resolve situations. Also as before, participants will have the opportunity to email questions to the instructor and all participants will receive a follow-up email summarizing all submitted questions and responses. As a result, we believe the webinar is an "effective" interactive vehicle for providing training.

As you can see, guidance from the Commission as to the criteria to use in evaluating the effectiveness of this and other training programs would be invaluable in selecting this or any other training program.

2. **Qualified Trainers** – Unless the Commission wishes to find itself in the role of licensing providers, ultimately each employer must select its training provider keeping in mind the need to do what is necessary to prevent inappropriate conduct and possibly defend against a sexual harassment claim utilizing the *State Department of Health Services v. Superior Court of Sacramento County*'s "avoidable consequences" defense or the federal "Ellerth/Faragher" defense. Whether this means that a particular employer selects an on-line course, a webinar, an outside consultant or attorney or an in-house trainer should be left to that employer. There are attorneys, consultants and trainers with varying degrees of acquaintance with sexual harassment issues, and there are also in-house HR professionals similarly situated. Once again, the purpose of the regulations should not be to identify a preferred trainer, but rather to assist employers by identifying the criteria to be used in evaluating available training programs.

The Commission's guidance would therefore be helpful in elaborating on desirable training content, elaborating on the law's requirements for, "…information and practical

guidance regarding the federal and state statutory provisions concerning the prohibition against and the prevention and correction of sexual harassment and the remedies available to victims of sexual harassment in employment. …" including "…practical examples aimed at instructing supervisors in the prevention of harassment, discrimination, and retaliation." Armed with these criteria, an employer can evaluate and compare the alternative resources.

Defining Employer And Supervisor – It is a difficult stretch to assume the legislature meant that an employer of fifty or more persons included only employees in the state of California. If that were so, it could have easily been said. We also believe that the FEHA's current definition of "supervisor" was contemplated as being applicable.

We have counseled employers that it is in their best interest to understand the law to be more inclusive than exclusive, as compliance is in their best interest both as prevention and as a defense to a sexual harassment claim. For that reason, employers should be encouraged by the regulations to train out-of-state supervisors who have interaction with California employees, and the regulations should also clarify that a supervisor transferred in from out-of-state must be trained within six months of transfer just as would a newly promoted supervisor.

The law is silent on the obligation to train a supervisor who is a leased employee. The employer should be required to assure itself that training has been provided by the leasing agency. But since an effort may be made to hold the employer jointly responsible for this supervisor's conduct, the regulations should limit the employer's responsibility to obtaining such assurance, providing that insufficiency of the leasing agency's compliance is not attributable to the employer.

I agree however with the suggestion that the regulations make clear that inclusion of an employee in the training should not be evidence of an employee's supervisory status.

Expansion of Training Content Beyond Sexual Harassment – While encouraging employers to include identification and advice on other forms of harassment is laudable, I believe the answer is contained in subsection (f) of the statute. That language encourages employers to go beyond the mandate to provide sexual harassment training, but it does not relieve them of the two-hour requirement on the specific subject. A training program that incidentally recognizes the applicability of general concepts to other forms of harassment or discrimination should not be disqualified, but the intent of the law was to maintain focus on sexual harassment.

Safe Harbor Provision for Pre-Regulation Compliance –The proposed and final regulations should include a provision recognizing that the good-faith efforts of employers to comply with the law in the absence of regulations shall be sufficient until 90 days following the final adoption of the regulations. The 90-day period protects employers and training providers who planned or contracted for training services before final regulatory action.

[Commission Note: Submitted by Garry Mathiason, Littler Mendelson, 11/10/05]

As you consider your organizational training objectives for the upcoming year, we encourage you to review the below data compiled by LLG while tracking a recent training program In 1998, the State of Washington implemented a comprehensive employment law training program through LLG. The program was called the HELP Academy and represented a state-wide effort to provide Washington's workforce with up-to-date employment law training and prevention tools.

The benefits received by Washington State as a result of the training were dramatic. Prior to retaining the Littler-based training, Washington experienced an average of 110 employment-related claims annually between 1995 and 1998. Since the program's introduction in 1998, the organization has experienced a 42% reduction in the number of claims per year - from an average of 110 claims per year to 64. Excluding settlement and award costs, the client calculated a hard cost savings of $2.2 million dollars per year.

For your review, we have enclosed a visual aid that illustrates the HELP Academy benefits.

You will note that "soft" costs are not encompassed by the HELP Academy data; however, they typically have a dramatic impact in the following areas:

Per Single Employment-Related Claim

· Average manager time expended in the claim process: 40 hrs.
· Average employee time expended in claim process: 40 hrs.
· Average employee time spent investigating the claim: 60 hrs.
· Average employee time spent preparing for trial: 60 hrs.
· Morale, productivity, insurance-cost, publicity issues

In the final analysis, the resounding conclusion drawn from the HELP Academy approach is both simple and profound - the avoidance of a single claim more than pays for the annual cost of a comprehensive training program.

As you finalize future training plans, we recommend that you use the HELP Academy data to focus in on clear and tangible objectives you will seek to fulfill through whatever program(s) you choose to implement.

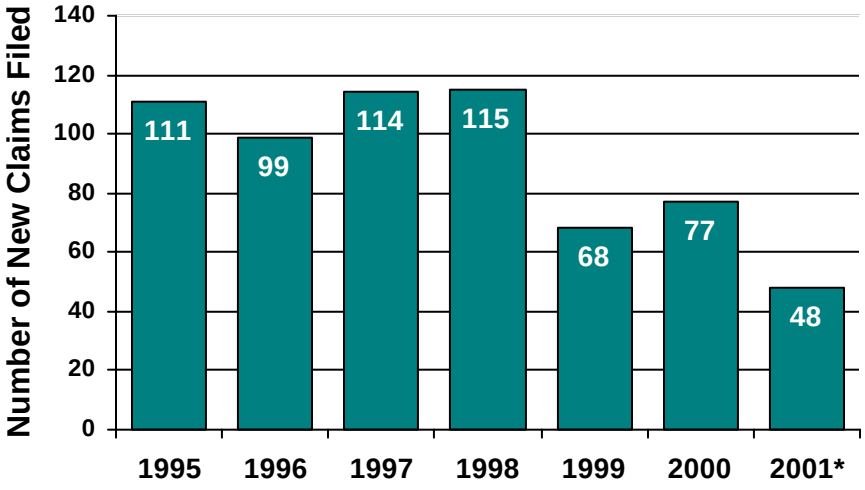
We look forward to helping you work towards the most effective, employment law training solution for your institution.

Washington State Department of Personnel

Preliminary HELP Academy Results to Date

Annual Number of New Employment-Related Claims Filed

Year	# of New Claims Filed	% Change from Previous
Base Period – Pre-HELP		
1995	111	+34%
1996	99	-11%
1997	114	+15%
1998 (HELP introduced in February)	115	+1%
Base Period Average: 95-98	**110**	
Post HELP Period		
1999	68	-41%
2000	77	+13%
2001 Projection*	48	-38%
Post HELP Average	**64**	
Change: Post HELP vs. Base Period	**-46 cases per year**	**-42%**



- Since HELP was implemented, the number of new claims filed per year has declined substantially, to the lowest level since at least 1993
- To date, the number of new claims filed per year has dropped 42% in the post-HELP period versus the base period
- Cost avoidance savings in post-HELP period total an estimated **$2.2 million per year** as a result of reduced attorney fees, investigators, court costs, etc. (excludes settlement and award costs)

* Projection for 2001 is based on actual # of new claims filed for first 4 months (Jan – April) projected to annual basis

Savings assumptions: 46 fewer cases per year, of which 25% go to litigation = 11 fewer cases per year X $200K average cost per case = $2.2 million

Source: GA Division of Risk Management.

4/23/01

HELP Academy was designed by Littler Mendelson and Washington State Department of Personnel

FEHC Comments from Michael Korcuska (mkorcuska@elt-inc.com)

August, 2005

Interactive

It is useful to distinguish between Instructor-Led Training (ILT), Individualized E-Learning and Facilitated On-line Learning (Webcast or Webinar). Courses in each of these formats have the potential to be more or less interactive and I believe it is important to establish guidelines for each type. For example, a decent e-learning program is probably more effective than an ILT class delivered to 100 people—the amount of interaction available in the former is likely to be greater than that available to most individuals attending the latter.

There are various reasons why you would want to make training be "interactive," ranging from making sure the learner was awake to making sure they could apply the skills in real life. I suggest that the guidelines for interactivity be designed to ensure that learners are paying attention and understanding the content while it is being presented. Anything beyond this to something like "retains the information" will likely create administrative burdens for the FEHC (e.g. what do they need to retain, for how long and how can we tell).

For any format, I suggest the following two requirements:

- The course offers a way to ask a human a question that is responded to in a reasonable time period (7 days). While this may seem useful only for e-learning or webinars it also gives an instructor an opportunity to research a question he/she may not know the answer to rather than being required to make something up.
- Requires evidence of active participation from the learner every 15 minutes.

That said, I suggest the following standards for each type of learning:

ILT: The main issues here are the ability for the instructor to determine whether or not individuals are grasping the information. This means that the format needs to include *participation from each individual in the class* on a regular basis. This could happen in one of many ways including role-playing exercises, question-and-answer opportunities or the administration of quizzes throughout the session. The limits of this format will be reached at class sizes greater than 30 people per 1 instructor. At this size a 2-hour class with 1 hour of presentation and 1 hour of exercises leaves a maximum of 2 minutes of individualized attention per student.

E-Learning: You want to make sure learners can't just click "play" and then walk away. You also want to make sure that they are grasping the subject matter. I would recommend that the program have a mechanism to ensure the learner is sitting in front of it (e.g. a button that needs to be clicked every minute, on average) and that frequently asks the learner questions related to the content of the program and, importantly, provides feedback as to why their answer was right or wrong. It is preferable to require them to answer the question correctly before advancing for two reasons. First, it reduces the

chance that they will randomly guess at the answer and, second, it increases our confidence that they understand what the right answer is.

Facilitated Webinar: This is the trickiest. The instructor doesn't have the ability to see the students to ensure they are paying attention and you don't have the same individualized experience provided by e-learning. These tools have a number of capabilities to get input from participants including polls, quizzes and even virtual "breakout sessions". It is critical for facilitated webinars to include some sort of interactive activity every 15 minutes. If a learner misses one of these it is a good sign they are not paying attention (they have left, their computer has crashed, etc.) and they should be required to retake the class. Even with all these protections, this is the easiest format not to pay attention to.

I have one final comment on testing. I would NOT create a requirement for a formal test—asking questions throughout the learning experience should be enough. As soon as you have a requirement for a test you create issues as to which questions are valid, what a minimum score is, what to do about people who don't pass after a certain number of attempts, etc.

<u>2 Hour Requirement</u>

This is a tough one for e-learning. It may seem simple, but it isn't. While it is possible to have a timer in an e-learning course there are a number of problems with its accuracy. First, one of the benefits of e-learning courses is that they can be taken in multiple sittings using a bookmark feature to store a users place in the course. According to the e-learning standards (AICC and SCORM) the responsibility a single session falls to the course while maintaining the overall time a user has spent in a particular course, possibly across multiple sessions, falls on the learning management system (the tracking system for learner results). While most courses and LMSs should have implemented these systems these timing features are not a common part of e-learning implementations and will require a lot of scrambling by various vendors and organizations to try to make sure all the systems work together correctly.

More importantly, though, a fundamental premise of e-learning that it is self-paced. Faster learners should be able to move through the material more quickly than slower learners. Someone who gets all the answers right should move more quickly than someone who gets them all wrong and has to try again. This problem is really highlighted when you watch a blind learner use a program using a screen reader which can accelerate the pace through the program significantly. What should a course do if a user has completed the training in slightly less than 2 hours. Ask them to repeat certain sections? Present optional material? It seems pointless to require a faster learner to cover more material than a slower one because the 2 hour standard is really driving at *a minimum amount of content covered.*

Finally, the comparison to ILT as a baseline is instructive. While there is a 2 hour requirement there is no mention of how much of this can be spent on administrative tasks

(e.g. registration, instructor evaluations, bathroom breaks, introductions, etc.). This brings me back to looking at the possible reasons for a two-hour requirement which must be related to ensuring a certain amount of content is covered and that the course isn't simple skimming the surface.

The standard, therefore, should be the approximate amount of content that is covered in a 2-hour ILT class. I would recommend for e-learning, therefore, trying to find some objective measure of the amount of content in the course that meets or exceeds what is covered in a good 2 hour ILT class. I think defining a "total average running time" of 2 hours with that being measured as follows:

- The total running time of the audio files that are required to be heard to complete the course, PLUS
- The total reading time of the text content that is not on screen while a voiceover is playing as measured by an average reading speed of 200 words/minute.

So, a course with 1 hour of spoken audio and 12,000 additional words would meet the requirement. This, by the way, is much more content than would be covered in a 2-hour ILT course.

This gives us an operative definition of an e-learning course that is "long enough" (i.e. contains enough content) without requiring companies to actually keep records on how long someone took to complete an e-learning course. This, combined with the "interactive" requirement should get us to what the legislature wants—an assurance that someone is paying attention to a certain amount of real content.

Note also that this lack of exact record-keeping will not make e-learning any different from ILT or webinars. There will be no record that an ILT class actually lasted 2 hours or more or that none of the individuals arrived late, left early or took a break to go to the restroom. The point here is that while the standard suggested above may allow a small percentage of people to spend less than 2 hours the general error rate for e-learning will be the same as for ILT. Anything more stringent for e-learning will create implementation headaches that provide no additional value.

Suggested language:

The time spent in an electronic learning program will vary based on the individual's reading and learning speed. An electronic learning program should have a target length of 2 hours or more for an average learner as measured by the total length of audio files that are required to be heard plus the total number of words of required reading, assuming a reading speed of 200 words per minute. Programs are not required to have a built-in timer that causes learners to view additional content until the 2-hour standard is reached.

<u>Every 2 Years</u>

This seemingly innocuous requirement is actually a headache for implementation. Everyone will be trained by the end of 2005. Some individuals will have completed in May, some in December. Does that mean that their retraining requirement is for the same

day in 2007? While tracking at this level is possible using modern learning management systems, I would argue that it would be easier if organizations could set a training calendar every 2 years rather than having to create a calendar for each individual employee. So, assuming I have everyone trained by the end of 2005 I will have until the end of 2007 to retrain them. It doesn't matter if Jane Doe completed the course in August 2005…she will have until December 2007 to complete it again. While this takes us formally outside the "2 year" requirement for Jane, the organization as a whole is in compliance.

Only Sexual Harassment

There are three sensible positions here. First, it must be 2 hours of only sex. Second, the two hours must contain sex harassment and harassment/discrimination on other protected categories. Third, the program could be sex only or could contain both sex harass content and other content areas. I think the 2nd option is the best. Otherwise we are in danger of crowding out other harassment training because organizations only have so much time to do training. Alternatively the 3rd options would be acceptable.

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Barry's Initial Responses [Commission Note: Submitted 8/23/05]

Potential Issues for Mandatory Harassment Training Regulations

1. Do the 50 employees need to reside in California?

No. The FEHA clearly states, "An entity shall take all reasonable steps to prevent harassment from occurring." §12940(j)(l) While the intent of the mandatory training is to ensure harassment-free work environments for California employees, there are organizations that employ 50+ individuals where not all employees (and, in some cases a minority) reside in California. The California employees, even if they number less than 50, can be subjected to harassment. Therefore, the training requirement should not necessitate a minimum of 50 employees reside in California.

2. Should out-of-state supervisors be covered by section 12950.1 if they supervise California employees?

Yes. Again, (1) in the spirit of taking all reasonable steps to prevent harassment in general, and (2) to protect California employees from harassment in particular, out-of-state supervisors who supervise California employees should be covered by section 12950.1.

3. Should FEHA's definition of a supervisor, at Government Code section 12926, subdivision (r), define "supervisor" for 12950.1 training purposes?

Yes. Further, the interpretation of the definition of a supervisor should error on the side of being more expansive and inclusive than on a more narrow conception, such as the common understanding of having a direct reporting relationship.

The U.S. Supreme Court affirmed this notion in the *Ellerth* and *Faragher* analyses. In its Enforcement Guidance 915.002, issued June 18, 1999, the EEOC states, "An individual whose job responsibilities include the authority to recommend tangible job decisions affecting an employee qualifies as his or her supervisor even if the individual does not have the final say (*Ellerth*)."

With regard to the two alleged harassers in *Faragher*, the document states, "There was no question that the Court viewed them *both* as 'supervisors,' even though one of them

apparently lacked authority regarding tangible job decisions."

In the very first sexual harassment case in which I testified as an expert witness (years ago in California), the Court held the reasonable belief or perception by the plaintiff that a defendant, within the circumstances of the case, was in a position of supervision was sufficient in determining potential vicarious liability. This reasoning has been affirmed in other cases as well.

Finally, in the language of today's workplaces, there is often confusion about who is in a position of supervision based on job title. For example, there are "Project Managers" who do not supervise or manage employees as their job titles might suggest. Likewise, there are individuals, such as "Team Leaders" in some organizations, whose functions fall within the description of FEHA's definition of a supervisor even though their employers do not title them as supervisors.

4. Does section 12950.1 training need to be given all at once? If not, what should be the minimum duration of harassment training?

As a trainer who has conducted training on this topic for 20+ years, I believe it can be challenging to effectively address the components mandated by section 12950.1 in a two-hour session, especially if the format is interactive, as required, and organization-specific examples are adequately discussed. Therefore, I believe the training be delivered all at once. This, however, does not preclude conducting follow-up training, e.g., enhanced skill-building in addressing harassment situations, even though such follow-up training is not required.

5. What constitutes "interactive" training?

Quite literally I believe "interactive" means the training participant interacts with the training content and material. There are several well established techniques in the training community that are recognized as effective methods of reinforcing learning through interaction with adults who have various learning styles (visual, auditory, kinetic, etc.).

Examples include surveys (written and oral), quizzes (such as pre- and post-tests), reacting to role-play scenarios, responding to written or video vignettes, dyad discussions, small and large group exercises, skill-building practice (such as initially receiving an harassment complaint), and active question and answer sessions.

While there has been an increase in e-learning methodology in recent years, facilitated sessions conducted by professional trainers remain the most effective. Qualified trainers have the ability to monitor participant attention, respond to specific questions that are organization-specific, alter the training agenda based on audience need and most effectively shape the interaction to meet the training goals and objective.

6. What constitutes sufficient "knowledge and expertise" in a 12950.1 trainer?

Factors to consider include familiarity with the established body of knowledge in the area of workplace harassment, including an understanding of state and federal civil rights laws, the enforcement agencies procedures and guidelines for employers; knowledge of case law examples through course study, case consultation, and/or expert witness experience; practical experience in (1) prevention efforts, including policy and procedures development, (2) responding to claims, such as receiving and investigating complaints, and (3) resolution methods, such as conflict resolution, mediation, and alternate remedies.
In addition, sufficient expertise would include years of experience in providing training, including to audience members which might display hostility (which is not infrequent in mandatory training settings); with diverse groups; and in a wide variety of industries.

7. Is a certification process desirable for trainers? If so, what procedure would you recommend to certify trainers?

I would not recommend certification at this point, as the development, implementation and monitoring could require enormous resources. I would, however, consider standards for trainers (see factors in question 6 above) and possible registration.

8. How best to cover effectively the mandatory content?

Each training should be tailored to the specific audience, accounting for work culture, language, norms and values. In addition to the components listed in 12950.1, content should include definitions of relevant terminology, workplace-specific examples discussion of perception differences with regard to behavior (based on factors such as gender, race/ethnicity, class, etc.), review of organizational policies and procedures, and informal and formal resolution strategies. Effective methodology is discussed in question 5 above.

9. Should the mandated training include other types of harassment (racial, religious, sexual orientation, etc.) to be included in the training in addition to sexual harassment?

Yes. As stated in 12950.1, the mandated training "is intended to establish a minimum threshold." As a practical matter, sexual harassment situations often occur in environments where other inappropriate behavior exists, including conduct that constitutes violations of other legally protected categories. Along with the numerous sexual harassment complaints the DFEH receives, an even larger number of race-based claims (including national origin, ancestry, and color) are made, a growing phenomenon in the Post-911 era.

In addition, behavior that constitutes sexual harassment can, depending on the circumstances, simultaneously encompass other forms of harassment, for example, based

on sexual orientation and/or gender identity.

10. Suggestions for language for a “sunset provision” for the 12950.1 training employers have already provided their supervisors without benefit of FEHC regulations?

11. Should there be any enforcement mechanism set forth in the regulations? If so, how best should the statute be enforced?